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HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 1734

A BILL TO PROHIBIT FALSE STATEMENTS TO CONGRESS, TO CLARIFY CONGRESSIONAL AUTHORITY TO OBTAIN TRUTHFUL TESTIMONY, AND FOR OTHER PURPOSES

MAY 14, 1996

Serial No. J–104–80

Printed for the use of the Committee on the Judiciary

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FALSE STATEMENTS AFTER THE HUBBARD v. UNITED STATES DECISION

TUESDAY, MAY 14, 1996

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Also present: Senator Abraham.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Good morning, ladies and gentlemen. It is 10 o'clock, so we will proceed with our hearing on Senate bill 1734, which will restore penalties for making false statements to Congress.

Without objection, my extensive 5-page statement will be included in the record, and I thank my distinguished chief counsel, Richard Hertling, for preparing the statement. It lays out in comprehensive detail the background and purpose of the legislation. In essence, it overrules the recent decision of the Supreme Court in *Hubbard,* which overturned the decision of the Supreme Court in *Bramblett,* under which for 40 years false statements to Congress had been punishable under section 1001. For reasons set forth in detail in my statement, that is protection that Congress needs and there is now reason to change the law to restore that important protection.

[The prepared statement of Senator Specter follows:]

PREPARED STATEMENT OF SENATOR ARLEN SPECTER

I am very pleased that the Committee is holding this hearing on legislation of vital importance. The bill under consideration advances a fundamental principle that lying in dealings with the government is simply unacceptable, no matter which part of the government is lied to.

Last year the Supreme court overturned its 1955 decision in *Bramblett* v. *United States* and held in *Hubbard* v. *United States* that 18 U.S.C. 1001, the statute that prohibits making false statements to agencies of the federal government, only prohibits false statements made to agencies of the Executive Branch.

There is no reason why Congress should receive less protection than the Executive. The cardinal principle at stake is that in dealing with the government, any part of the government, people must, in the words of Justice Holmes, "cut square corners," just as the government must cut square corners in dealing with its citizens. One who lies to an entity of government, be it an agency of the Executive or a subcommittee of Congress, is under a justifiable expectation that if he or she lies, he or she will be punished.

This is not a difficult issue. For 40 years, Congress received the same protection as the Executive. Anyone who lied knowingly and willfully in a material way to ei-

ther an Executive agency or a component of Congress was subject to prosecution. In its *Hubbard* decision of last year, the Supreme Court took that protection away from Congress.

Let me offer an example of the types of lies that can now knowingly be made without fear of criminal sanction. Many of us ask the General Accounting Office to investigate the operations of Executive Branch agencies. An employee of an agency being investigated by the GAO can now knowingly lie to a GAO investigator, or indeed a Senator, without having to fear criminal prosecution. Of course, if instead of the GAO the review was being conducted by an agency Inspector General, then section 1001 would apply. This distinction cannot be justified.

Congress relies on accurate information to legislate, to oversee, to direct public policy, unless the information coming to us is accurate, we are unable to fulfill our constitutional functions. This issue is a simple one. When someone provides information to Congress, its members, committees, or offices, that person should not knowingly provide untruthful information. So simple is this principle that I first offered legislation to overturn the *Hubbard* decision a week after it was decided. Since introduction of my bill, S. 830, I have been working with Senator LEVIN on the language of amended section 1001 and on some other ancillary matters.

Last week, Senator Levin and I, together with Senators Stevens, Nunn, Cohen, Inouye, Jeffords, and two other members of this Committee, Senators Leahy and Kohl, introduced S. 1734. This new bill will amend section 1001 to restore coverage for false statements made to both Congress and the federal judiciary, although it will codify the judicially-created exception to the pre-*Hubbard* section 1001 to exempt from its coverage statements made to a court in connection with its performing an adjudicative function. The rationale for this exception is that our adversary system relies on unfettered argument and the chilling effect from applying section 1001 to statements to a court adjudicating a case could be significant. In addition, cross-examination and argument from the other side is adequate to reveal misstatements in the judicial context.

No similar legislative-function exemption is proposed for false statements made to Congress, and none is needed. Congress does not rely on cross-examination to get at the truth. Instead, we must rely on the truthfulness of statements made to us in the course of the performance of our official duties. In addition, for the 40 years in which section 1001 was thought to protect Congress, there does not appear to have been a single case of abuse of the statute to target constituents, lobbyists, and others who routinely communicate with Members of Congress and their staffs concerning legislative matters.

In addition to restoring section 1001 liability for false statements made to Congress and the courts, S. 1734 would restore force to the prohibition against obstructing congressional proceedings by narrowing the meaning of the provision. This amendment is needed to respond to a decision of the United States Court of Appeals for the District of Columbia Circuit which found the current statute too vague to be enforceable.

The bill also clarifies when officials of Executive Branch agencies can assert a privilege and decline to respond to inquiries from Congress. The bill requires that an employee of an Executive agency would have to demonstrate that the head of the agency directed that the privilege be asserted. This will ensure that the assertion of the privilege is reviewed at the highest levels of the agency by someone accountable to the President and ultimately the people. it will also ensure that any privileges that are asserted are governmental privileges and not personal ones.

Finally, the bill would make a minor technical amendment to the statute allowing Congress to seek to take immunized testimony from witnesses by clarifying that the testimony can be taken either at proceedings before a committee or subcommittee or any proceeding ancillary to such proceedings, such as depositions.

I believe S. 1734 is an important bill that will restore to the law of the land the principle that one cannot knowingly and willfully lie about a material matter to Congress. I hope that it can be enacted this year. In that regard, I am pleased that the Judiciary Committee is holding this hearing so soon after the introduction of S. 1734.

We have with us today five distinguished witnesses to discuss the issues relating to S. 1734. On our first panel we are joined by the lead cosponsor of the legislation, the distinguished senior Senator from Michigan, Carl Levin, and Representative William Martini, a freshman Republican from the Eighth District of New Jersey, who has introduced similar legislation in the house of Representatives. It is a pleasure to welcome Congressman Martini, who shares with me a background as a prosecutor, to the Committee.

On our second panel, we are joined by Deputy Assistant Attorney General Robert Litt of the Justice Department, Senate Legal Counsel Thomas B. Griffith, and Pro-

fessor Charles Tiefer of the University of Baltimore Law School, who previously served in the offices of both the Senate and House Legal Counsel, before fleeing to academia.

The Committee welcomes all of our distinguished witnesses and looks forward to hearing their testimony.

Senator SPECTER. At this time, I would like to call our first panel. Senator Levin has not yet arrived, but I believe Congressman Bill Martini is present. Would you step forward, Bill? We are pleased to have you here.

I might just say in passing the bill which has been introduced, S. 1734, which Senator Levin and I have introduced, is an amalgam of S. 830 which I introduced shortly after the *Hubbard* decision, and S. 887 which Senator Levin introduced a short time later, and our new bill, S. 1734, is cosponsored by Senators Stevens, Nunn, Jeffords, Inouye, Cohen, Leahy, and Kohl.

We welcome you here, Congressman Martini, and look forward to your testimony. Congressman Martini, before you begin, Senator Levin has just arrived. Let me welcome my distinguished colleague, and since he is senior to both of us, I hope you won't mind if I turn to him first.

Representative MARTINI. Not at all.

Senator SPECTER. He is also up for reelection.

Senator LEVIN. Just keep adding reasons, Mr. Chairman. They are all sound, so thank you.

Senator SPECTER. Senator Levin, let me welcome you to this committee. I have just said that the current bill, 1734, is an amalgam of your bill, S. 887, and my bill, S. 830, and that it seeks to subject false statements made to Congress to the penalty provisions of 18 U.S.C. 1001.

With that, we will turn to you, Senator Levin.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you very much, Mr. Chairman and Senator Abraham. Good morning. Mr. Chairman, first, let me thank you for your leadership in this area to fix a problem which was recently created which hadn't existed for 40 years.

As you know well, the Supreme Court had previously interpreted 18 U.S.C. section 1001 to prohibit the knowing, willful, material false statement of fact not only to the executive branch, but also the legislative branch and the judicial branch, as well, so that we had a governmentwide prohibition for 40 years as the law of the land. It served the country well, but then in *Hubbard* last year the Supreme Court reversed those 40 years of precedent and decided that the prohibition of misrepresentation of a willful, material statement of fact only applied to the executive branch and not to the coequal branches of Government.

Now, that has created a problem for those branches, including our branch. It seems to me that there is sort of a fundamental question here, which is whether or not all three branches should be treated the same, whether there should be a parity between the three branches relative to a willful misrepresentation of a material fact to those branches.

Now, different parts of each branch of Government depend in various ways on factual statements, but surely we in the legislative

branch depend heavily on those statements, and that is true both in the legislative process and in the oversight process. It is hampering to us and it removes a deterrent when the Code does not prohibit the knowing making and the willful making of a material false statement of fact.

As you know, Mr. Chairman, there are a number of other provisions of our bill which would strengthen 3 other statutes that protect Congress against false statements. It would clarify the prohibition against obstruction of Congress, clarify the subpoena enforcement authority of Congress, as well as our ability to obtain testimony from immunized witnesses in depositions, as well as in hearings.

But I think what this really goes to is whether or not we, because of the seriousness of our work, should be treated with equality, with parity, and with the same seriousness as other branches of Government, particularly the executive branch, relative to our work. We rely all the time on statements of fact which are made to us both in our legislative process and in our oversight process.

There are very few committees of this Congress that do not rely on people coming forward, making specific representations as to what facts are, and it is almost a matter of respecting our process to the same extent that we respect the executive branch's process. They do important work, obviously. They rely on representations of fact. So do we and so does the judicial branch, and in that reliance and in pursuit of our functions it seems to me critical that we have the statute restored to what we thought it was for 40 years.

Finally, this is not a question of constitutional interpretation. This is not an issue where the Court said, there would be some question as to whether or not you could constitutionally apply the material misrepresentation law to people who were before Congress or making those representations to Congress. This was purely a question of statutory interpretation, where the Supreme Court decided that the Congress had not considered whether or not it wanted to be covered or the judicial branch was covered, and there was no sufficient clarity in the law that it was congressional intent to cover Congress and the judicial branch.

But there is, as far as I read the opinion, no constitutional issue as to whether or not we could, if we so desire, apply the same rule to willful, material misrepresentations of fact to people who are dealing with us just the way those willful, material misrepresentations of fact are dealt with relative to people who are working with the executive branch.

So I think our work is just as important, just as serious. Our reliance on representations of fact is just as heavy as it is in the executive branch and I think we ought to deal with those willful misrepresentations to the Congress in the same way that they are dealt with relative to the executive branch, and I would say the same thing relative to the judiciary.

I want to thank you again for your leadership in this effort, Mr. Chairman, and I am proud to cosponsor your bill.

[The prepared statement of Senator Levin follows:]

PREPARED STATEMENT OF SENATOR CARL LEVIN

Forty years ago, in 1955, the Supreme Court interpreted 18 U.S.C. 1001 to prohibit knowing, willful, material false statements not only to the executive branch, but also to the judicial and legislative branches. For forty years, this government-wide prohibition was the law of the land, and it served this country well. But last year, in *Hubbard* v. *United States,* the Supreme Court reversed these forty years of precedent and held that Section 1001 prohibits false statements only to the executive branch, and not to any co-equal branch.

The Supreme Court based its decision on the wording of the statute which doesn't explicitly reference either the courts or Congress. The Court noted in *Hubbard* that it had failed to find "any indication that Congress even considered whether [Section 1001] might apply outside the Executive Branch." [Emphasis in original.]

The obvious result of this Supreme Court decision has been to reduce parity among the three branches. More, it has created an illogical differentiation, since there is no logical reason why the criminal status of a willful, material false statement should depend upon which branch of the federal government received it.

Fortunately, this problem does not involve constitutional issues or require complex legislation. It is simply a matter of inserting a clear statutory reference in Section 1001 to all three branches of government.

Senator Specter and I each introduced bills last year to supply the missing statutory reference. This year, we decided to join forces, along with a number of our colleagues, and introduce a single bill to restore parity among the branches. Our bill, S. 1734, the False Statements Penalty Restoration Act would amend Section 1001 to make it clear that its prohibition against willful, material false statements applies government-wide to all three branches. The bill would essentially restore the status quo prior to *Hubbard.* As part of that restorative effort, the bill would maintain the long-standing judicial function exception, developed in case law, which exempts from Section 1001 statements made to courts performing adjudicative functions, in order to ensure vigorous advocacy in our courtrooms.

As you will hear from other witnesses today, the false statements prohibition in Section 1001 had proven itself a useful weapon against fraud, financial deception and other abuses that affect all three branches of government. The Supreme Court's only reason for reducing the scope of this section was reliance on the express words of the statute itself. Our bill would change those words to clarify Congress' intent that the same false statements prohibition apply to all three branches.

S. 1734 would, in addition, strengthen three other statutes important to Congress, clarifying the statutory prohibition against obstructing Congress, the Senate's subpoena enforcement authority, and Congress' authority to obtain testimony from immunized witnesses in depositions as well as hearings. Two of these items have passed the Senate before, and all three are important to Congress' ability to conduct investigations.

The 50-year-old statute prohibiting obstruction of Congress, 18 U.S.C. 1505, has also been weakened by a court case. In 1991, in a dramatic departure from other circuits, the D.C. Circuit Court of Appeals held in *United States* v. *Poindexter* that the statute's prohibition against "corruptly" obstructing a Congressional inquiry was unconstitutionally vague and failed to provide clear notice that it prohibited an individual's lying to Congress. The court held that, at most, the statute only prohibited one person from inducing another person to lie or otherwise obstruct Congress.

The Specter-Levin bill would affirm the contrary view of the other circuits and bring the Congressional statute back into line with other obstruction statutes protecting government inquiries by making it clear that Section 1505 prohibits obstructive acts by a person acting alone as well as when inducing another to act. The bill would also make it clear that the prohibition against obstructing Congress bars a person from making false or misleading statements and from withholding, concealing, altering or destroying documents requested by Congress. The bill would, in short, restore the strength and usefulness of the Congressional obstruction statute as well as restore its parity with other obstruction statutes protecting federal investigations.

The final two sections of the bill would clarify the ability of Congress to compel truthful testimony. Both provisions are taken from a 1988 bill, S. 2350, sponsored by then Senator Rudman and cosponsored by Senator Inouye, which passed the Senate unanimously but was never enacted into law.

The first of these two provisions would clarify when an executive branch official may avoid judicial enforcement of a Senate subpoena under 28 U.S.C. 1365, by requiring the head of the official's agency to identify the government privilege at issue and concur in any decision to resist the subpoena. Any official resisting a Senate

subpoena without direction from his or her agency head would be deemed acting outside his or her official capacity and therefore subject to judicial enforcement.

The second provision involves individuals given immunity from criminal prosecution by Congress. The bill would re-word the Congressional immunity statute, 18 U.S.C. 6005, to parallel the judicial immunity statute, 18 U.S.C. 6003, to make it clear that Congress can compel testimony from immunized individuals not only in committee hearings, but also in "ancillary" proceedings such as depositions conducted by committee members or committee staff. This provision, like the proceeding one, would improve the Senate's ability to compel truthful testimony and obtain requested documents. It would also bring greater consistency across the government in how immunized witnesses may be questioned.

The bill before you is a bipartisan effort to redress some of the imbalances that have arisen among the branches of government with respect to Section 1001. It rests on the premise that the courts and Congress ought to be treated as co-equal to the executive branch when it comes to the protections provided by 18 U.S.C. 1001. I appreciate your holding this hearing, and I look forward to working with the Committee to advance this important legislation.

Senator SPECTER. Thank you so much, Senator Levin, and thank you for your leadership and your help. We struck the arrangement on a subway ride for a vote where Senator Levin said to me, your bill is fine, but I have some improvements, and we married the bills.

Senator Hatch expresses his regrets that he cannot be here because of a scheduling conflict, and we will put in the record, without objection, a statement by Senator Nunn and any other written statements received by the committee by Friday of this week.

[The prepared statement of Senator Nunn follows:]

PREPARED STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Mr. Chairman and Members of the Committee, I am pleased to submit the following statement in support of S. 1734, the False Statements Penalty Restoration Act. As an original co-sponsor of this legislation, I believe it is virtually important to restoring the effectiveness of the legislative oversight role which properly rests with the Congress.

As the nation's most representative body, Congress must inform the public, as well as itself, about the matters on which it proposes to legislate. The exercise of this review is known as the oversight function. Writing in 1885, Woodrow Wilson, in his book Congressional Government: A Study in American Politics, stated his belief that the duty to inform was the most important responsibility of Congress.

The power to investigate government operations—the oversight function—is not, however, explicit in the Constitution. Instead, it is implied in Section 1 of Article 1, which states that "[a]ll legislative powers herein granted shall be vested in a Senate and a House of Representatives." Lecturing in Philadelphia in 1791, James Wilson, a U.S. Supreme Court Justice and a close friend of President Washington, said, "The house of representatives * * * form [sic] the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things."

Indeed, in that same year Congress embarked on its first oversight inquiry in response to a November 4, 1791 battle along the future Ohio-Indiana line near the headwaters of the Wabash River. There Miami and Shawnee Indians defeated a 1500 man force led by Major General Arthur St. Clair. Six hundred soldiers were lost. The House of Representatives appointed a select committee "to inquire into the cause of the failure of the late expedition under Major General St. Clair" and gave it the power to "call for such persons, papers, and records as may be necessary to assist [its] inquiries."

The courts have traditionally been supportive of Congress' right to gather the information it needs to legislate wisely and to perform the oversight function implied by the Constitution. In the 1927 case *McGrain* v. *Daugherty*, 273 U.S. 135 (1927), the Supreme Court came down forcefully on the side of congressional inquiry, holding that the power of inquiry, with process to enforce it, was essential if the legislature was to function effectively. Subsequently, in the 1957 case *Watkins* v. *United States*, 354 U.S. 178 (1957), the Court described the investigatory power as being "broad," and as "encompass[ing] inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. * * * It comprehends probes

into departments of the Federal Government to expose corruption, inefficiency, or waste."

Recent decisions by the Supreme Court and the Court of Appeals for the District of Columbia, however, have seriously eroded the ability of Congress to effectively carry out its oversight function. In the case *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995), decided last year, the Supreme Court reversed forty years of precedent in holding that 18 U.S.C. 1001, commonly known as the false statements provision of the criminal code, applies only to false statements made to the executive branch and not those made to the legislative or judicial branches. Specifically, the *Hubbard* case reversed the 1955 decision in *United States* v. *Bramblett,* 348 U.S. 503 (1955), which had interpreted Section 1001's use of the phrase "department or agency of the United States" as applying equally to all three branches of the federal government. In the years following *Bramblett,* Section 1001 had been applied to a wide range of falsehoods, including those made to committees and administrative units of Congress, as well as those made in written material submitted to committee staff, in unsworn hearing testimony, and in unsworn statements made to Members in a setting which did not constitute a committee meeting or hearing.

A case of equal concern was decided in 1991, when the U.S. Court of Appeals for the District of Columbia Circuit, in the case *United States* v. *Poindexter,* 951 F.2d 369 (D.C. Cir. 1991), cert, denied, 113 S.Ct. 656 (1992), departed from other circuits in holding that the criminal provision for obstruction of Congress contained in 18 U.S.C. 1505 failed to provide clear notice that it prohibited an individual's lying to Congress. The court held that the statute could be used to punish an individual who induces another to lie, but not to punish one who lies by himself.

These two cases have severely undermined the ability of Congress to gather reliable information—an ability which is critical to the legislative oversight function. I say this not only as a Senator concerned generally with protecting the prerogatives of this institution, but as one who for twenty-three years has been actively engaged in carrying out the oversight prerogative through my relationship with the Senate's Permanent Subcommittee on Investigations. I joined the Subcommittee when I first came to the Senate in 1973, and I have served continuously since 1978 as either the Subcommittee's Chairman or Ranking Minority Member.

The Permanent Subcommittee on Investigations is the Senate's largest subcommittee and operates under an investigative mandate broader than that of any committee in Congress. In its forty-eight years of existence, the Subcommittee has investigated allegations of improprieties in various executive branch agencies, corruption in the labor-management field, organized crime, government waste, and military fraud and inefficiency. The Subcommittee is one of the few with standing authority to subpoena witnesses and documents as well as the authority to conduct depositions through its staff.

My experience with the Subcommittee has taught me that congressional oversight is not always an easy task. Not infrequently, oversight—to be effective—must become somewhat adversarial in nature. Many is the witness who has felt it necessary to invoke his Fifth Amendment rights in response to questioning by the Subcommittee. This includes not only members of organized crime, but union leaders, insurance executives, and owners of proprietary trade schools as well. Nor are witnesses or subpoenaed entities always willing to comply with congressional process. Case law on the enforcement of congressional subpoenas has been made as a result of the activities of the Subcommittee. And there have been those who attempt to mislead congressional committees. Indeed, even as S. 1734 is being considered by this body, a former top executive of a national insurance company is under indictment for perjury and obstruction of Congress in connection with a Subcommittee investigation.

If allowed to stand, the *Hubbard* and *Poindexter* decisions will severely cripple the ability of committees like the Permanent Subcommittee on Investigations to perform their constitutional function. Investigative committees must be able to rely on the information they obtain and to know that those who would lie, submit false documents, or otherwise obstruct a congressional investigation will be subject to punishment. S. 1734 restores the law on false statements and obstruction of Congress to the state it was before these decisions, a state which existed for many decades and which served as an important protection for this institution. I look forward to working with my colleagues to accomplish this restoration so that the congressional oversight function will remain a viable process.

Senator SPECTER. Now, Congressman Martini, we return to your testimony. Thank you for joining us.

STATEMENT OF HON. BILL MARTINI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Representative MARTINI. Thank you, and good morning, Senator, and good morning, Senator Abraham. I would like to once again thank you for giving me the opportunity to appear here this morning to testify on this important matter.

The question facing this committee is whether or not individuals who knowingly and intentionally issue a fraudulent or false statement to the legislative or judicial branch of the Federal Government should be subject to criminal prosecution under Title 18, section 1001, of the United States Code.

Tomorrow, for the first time in over 15 years, Members of Congress will file their financial disclosure statements without fear of prosecution or penalty for issuing fraudulent or false statements on these forms, were they to do so. Mr. Chairman, I believe that the public has the right to know that congressional financial disclosure forms are filled out truthfully and accurately.

As you are aware, I have introduced legislation in the House called the Government Accountability Act, H.R. 3166, which is intended to amend section 1001 of Title 18 in a manner that would make its application consistent with the legal precedents established prior to the Supreme Court's decision in *Hubbard* v. *United States*. Ironically, tomorrow will also be the 1-year anniversary of the Court's decision in *Hubbard*.

As a result of this decision, section 1001 of Title 18 is now only applicable to individuals who knowingly and willfully issue a false statement to the executive branch of the Federal Government. Individuals who issue false statements to the legislative or judicial branch of Government can no longer be prosecuted under section 1001. In *Hubbard,* the Supreme Court held that, "A court is neither a department or an agency within the meaning of section 1001." This clearly infers that Congress is certainly not an agency or a department of the executive branch.

In fact, Federal courts have recently used the *Hubbard* decision to overturn the conviction of a former Member of Congress and a former HUD official who lied to Congress. Federal prosecutors have also been forced to drop key indictments in criminal proceedings against several former Members of Congress as a result of this decision.

As a former assistant U.S. attorney in Newark, New Jersey, I know firsthand the importance of section 1001 of Title 18. In my opinion, this is a critical provision of the law which protects the Federal Government from false or fraudulent statements.

Quite simply, as the Senator said a few moments ago, this is an issue of parity. I can think of no reason why we would hold false statements issued to Congress or the judiciary with any less severity than those issued to the executive branch. I am concerned that without a viable Federal false statements statute, Government officials and others will be able to engage in acts of fraud and misconduct against the legislative and judicial branches of Government without fear of retribution.

Many of you may recall just a few months ago the fraudulent telegrams that were disseminated to Members of the House and the United States Senate during the debate on the Telecommuni-

cations Act. I know my office was deluged with literally trash bags filled with these so-called constituent telegrams and inquiries.

When my office contacted some of the individuals whose names appeared on the telegrams, these individuals were unaware of the telegram and had not given their permission to anyone to use their names on these letters. Unfortunately, because of the *Hubbard* decision, the U.S. attorney here in Washington, DC, was unable to seek criminal indictments against the individuals responsible for such fraudulent activity.

In the past, section 1001 of 18 U.S. Code has been used to successfully prosecute Members of Congress who have lied on their financial disclosure form, initiated ghost employee schemes, knowingly submitted false vouchers, and purchased personal goods and services with taxpayer dollars. Without a viable false statements statute, these crimes could very well go unpunished.

Mr. Chairman, one of the primary responsibilities of Congress is the oversight of the various functions of the Federal Government. Congress often makes legislative decisions based in part on testimony or information received from the executive branch and nongovernmental witnesses. We generally operate on the assumption that the testimony and information we receive from various Government officials is accurate and, of course, truthful. Many would suggest that it is the enforcement mechanism provided by the Federal false statements statute that ultimately protects the legislative branch from false testimony and misinformation.

I would like to just make it clear that the intention of my legislation is not to create a tidal wave of special prosecutor and independent counsel investigations into this administration or any future administrations. Rather, H.R. 3166 is meant to restore and clarify the Federal false statements statute to its pre-*Hubbard* application.

Much of the initial attention surrounding congressional efforts to restore the Federal false statements statute when it was introduced focused on the applicability of section 1001 to the judiciary. My legislation applies section 1001 to the judicial as well as the legislative branch. However, it specifically exempts formal courtroom proceedings, consistent with the court opinions in the *Morgan* and *Mayer* decisions. Accordingly, I have included language drafted in consultation with the Department of Justice to address this concern.

The goal in applying section 1001 to the judicial branch should be to provide a penalty for individuals who may lie or issue false statements in the context of the administrative duties of the judicial branch, not its litigation proceedings. During the House Crime Subcommittee markup of H.R. 3166, some of my colleagues also expressed concern that the Government Accountability Act did not contain a congressional advocacy exception that would exempt certain types of legislative advocacy from the scope of section 1001. These individuals are concerned that by codifying 1001's applicability to Congress, we may inadvertently chill the legislative process and dialogue.

As you know, Mr. Chairman, Congress has always been the arena in which the American people have come to express their ideas and beliefs. We must ensure that we do not stifle public de-

bate on the issues before this body. While I believe that H.R. 3166 as drafted would afford protection to those individuals who engage in advocacy of the legislative branch, I am willing to work with my colleagues in an effort to address their concerns on this important issue.

Prior to the *Hubbard* decision, an uncertainty or a vagueness existed among the various Federal courts concerning the applicability of section 1001 to Congress. Accordingly, Federal prosecutors pursued indictments under the Federal false statements statute with extreme caution in matters pertaining to Congress. Enactment of legislation like H.R. 3166 would leave no doubt about the application of section 1001 to Congress. I believe that, at a minimum, we must ensure that duly authorized investigations and administrative matters of the Congress are covered by section 1001 of 18 U.S. Code.

Just in conclusion, the American people have demanded a Federal Government that is not above the law. Without an applicable Federal false statements statute, we will seriously jeopardize the ability of this institution to protect itself from both internal and external fraud. The challenge before this committee is to address this important matter quickly and responsibility.

Once again, I thank the committee and the chairman for providing me this opportunity and hope that my testimony is helpful in your efforts to reach a successful resolution in this matter.

I thank you, Senator.

Senator SPECTER. Thank you very much, Congressman Martini.

It may be worth just a moment to make it explicit or as clear as we can that the statute does not apply to statements made by Members in the course of debate on the floor. Would you agree with that, Senator Levin?

Senator LEVIN. Yes.

Senator SPECTER. Congressman Martini?

Representative MARTINI. Yes, I would.

Senator SPECTER. I just asked my learned counsel if that were so and he said it would not apply to statements made on the floor on the grounds of the Speech and Debate Clause. I did not have a chance to pursue with him further the question as to how that would differ from a statement made by a citizen under the Free Speech Clause of the Constitution, but I do think it worth making it explicit that it does not apply to statements made on the floor.

During my tenure in the Senate, I have been amazed sometimes by statements which are made on the floor of the United States Senate being used in judicial proceedings where some semblance of evidence is required. The kinds of matters and proofs which are brought to the floor are really extraordinary, but then since perhaps no one is listening, it doesn't matter too much what is said, but I think it important to make that distinction.

Well, I think we are going to correct this Supreme Court decision. It is a little hard to understand how they do this after 40 years, but since they have done it, we are going to respond. So thank you very much, Senator Levin, and thank you very much, Congressman Martini.

Representative MARTINI. Thank you.

Senator LEVIN. Thank you, Mr. Chairman.

Senator SPECTER. We will move to the second panel now—Deputy Assistant Attorney General Robert Litt, Senate Legal Counsel Thomas Griffith, and Professor Charles Tiefer. Our practice, gentlemen, is to put on the red light for 5 minutes and if you have a claim of equal protection, you have to make it during the course of your 5 minutes.

Our first witness is the Honorable Robert Litt, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice. Welcome, Mr. Litt.

PANEL CONSISTING OF ROBERT S. LITT, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC; THOMAS B. GRIFFITH, LEGAL COUNSEL, U.S. SENATE, WASHINGTON, DC; AND CHARLES TIEFER, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE SCHOOL OF LAW, BALTIMORE, MD

STATEMENT OF ROBERT S. LITT

Mr. LITT. Thank you, Mr. Chairman. I would like to begin by thanking you and Senator Levin and Representative Martini for the interest and the leadership you have shown on this issue which is an important one to law enforcement.

The Department of Justice fully supports the goals of S. 1734, which you have introduced with Senator Levin and some others. As you know, we have offered our own proposal to achieve the same goals as S. 1734 and in my written statement, which is somewhat longer than my oral——

Senator SPECTER. It will be admitted, without objection.

What are the differences between your bill and 1734?

Mr. LITT. The principal difference has to do with the scope of the judicial function exception, and I would like to put that off for one minute and just join with the statements made by Senator Levin and Representative Martini about the need for this piece of legislation and the fact that it will fill a substantial gap which the Supreme Court discovered only last year existed in the law. We think it is very important to be able to prosecute false statements made to the judiciary and to this Congress, as well as to the executive branch.

Turning just briefly to the matter of the judicial function exception which you asked about, or you asked about the differences between the bills there, our bill, like S. 1734, would codify a judicial function exception. This was an exception that was originally created by the courts to exclude from the coverage of section 1001 certain false statements made in connection with judicial proceedings.

The courts did this because they were concerned about the effect that it might have on advocacy of lawyers and defendants, particularly in criminal cases. The question was raised in one of the earliest cases about this, is a lawyer violating 1001 if he stands up and argues for acquittal of a client he knows to be not guilty? As a result, the courts found that Congress, when it passed section 1001, must have intended an exception for this sort of statement.

The Department of Justice agrees that there needs to be some exception to protect this sort of statement and prevent the chilling of advocacy, but we think that it is important that the exception

be narrowly limited to protect only those statements that we need to protect to preserve the adequacy of the judicial function. We think it is important that the exception be clear and unambiguous to give notice to everybody of exactly what can and cannot be prosecuted.

Senate bill 1734 contains a judicial function that essentially turns on whether the statement is made to a court in its adjudicatory or its administrative capacity, and this is similar, frankly, to the test that has been applied by the courts, which is that if a statement is made to a court in its adjudicatory capacity, it is protected. If it is made in an administrative or housekeeping capacity, it is not protected.

Unfortunately, that distinction has been very difficult to apply in practice. I cite some cases in my written statement. In one pair of cases, for example, giving a false name to a magistrate during the course of a plea hearing was found to be prosecutable because that was held to be merely administrative, whereas in another case giving a false statement to a magistrate in a removal hearing was held not to be prosecutable because it was adjudicative. I don't think that that provides great clarity in the law.

The proposal that we have submitted, which I believe is essentially identical to that which Representative Martini mentioned as part of H.R. 3166, would provide that section 1001 does not apply to statements made by parties or their counsel to a judge or judges in a judicial proceeding. We think that the limitation on who the parties are and who the statement is made to will provide a clear bright line that will be much easier to apply than the adjudicative and administrative test that is now applied; that is to say, if it is made by a party or the party's counsel and it is made to a judge or judges, then it is protected. Otherwise, it is not.

This also, we think, would preserve the coverage of 1001 in a couple of important areas. For example, we think it is important to preserve the applicability of section 1001 to statements that are made to entities other than the court itself, to the probation office, to the Administrative Office of Courts, to grand juries, without having to go through an analysis of whether the statement is adjudicative or administrative in nature. That is why we have the limitation to a judge or judges.

Second, we have found that courts have held that section 1001 covers statements made to law enforcement officers during a grand jury investigation on the grounds that the law enforcement officers are working for the grand jury and therefore it is part of the judicial function. We don't think that is an appropriate expansion of the judicial function exception. There is no reason why somebody should be able to lie to an FBI agent when there is a grand jury investigation pending, but be prosecuted for lying when there is no grand jury investigation pending.

So we have submitted a proposal by letter to you and others which would codify a judicial function exception which is somewhat narrower and more precise and, we believe, more effective for law enforcement than that contained in S. 1734.

Beyond that, I believe that we are fully in accord with the provision of S. 1734 that relates to the amendment of section 1001. My written statement covers a couple of the other aspects of S. 1734.

Thank you.

Senator SPECTER. Thank you very much, Mr. Litt. We appreciate your thoughtfulness and the distinctions which you have made and we will take them very closely into account.

[The prepared statement of Mr. Litt follows:]

PREPARED STATEMENT OF ROBERT S. LITT

Mr. Chairman and members of the Committee, I am pleased to testify before this committee on the proposal to amend Title 18 of the United States Code to restore our ability to prosecute false statements made to the judicial and legislative branches of government. The Department of Justice fully supports the goals of S. 1734, which has been introduced by Senators Specter and Levin, along with others. As you know, the Department has offered our own proposal to achieve the same goals, and in my testimony I would like to highlight several ways in which we believe that the Department's proposal is preferable. The Department of Justice looks forward to working with you and other interested Members of Congress in filling the current gap in the law.

18 U.S.C. § 1001

Until last year, long-settled precedent established that Section 1001 of Title 18, the false statements statute, applied to statements made to any branch of government. However, in *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995), the Supreme Court held that the Legislative and Judicial branches were not "departments" for purposes of applying the false statement statute. In several subsequent cases, the Department has attempted to limit the scope of the *Hubbard* decision, but the courts have interpreted *Hubbard* broadly to mean that section 1001 applies only to statements within the jurisdiction of the Executive branch.

The *Hubbard* opinion overruled 40 years of prior law, and placed certain conduct which should be criminal beyond the reach of the criminal law. Because of the additional elements of proof that are required under the perjury and obstruction of justice statutes, section 1001 is the only viable mechanism for punishing the submission of false or fraudulent statements and documents in cases where the submission is not made under oath or in connection with a formal proceeding, such as the filing of financial disclosure forms.

As a result of *Hubbard,* criminal charges and convictions have been dismissed in several significant cases involving false statements to the Legislative branch, including *United States* v. *Dean,* 55 F.3d 640 (D.C. Cir. 1995), *cert. denied,* 116 S.Ct. 1288 (1996); *United States* v. *Rostenkowski,* 59 F.3d 1291, 1301 (D.C. Cir. 1995); and *United States* v. *Hansen,* 906 F. Supp. 688 (D.D.C. 1995).

The Department of Justice believes that it is essential to restore the prior law. People should not be able to lie to Congress or to the courts, whether they are under oath or not. Although, as I will discuss in a minute, the functioning of the adversary system requires that we afford a certain amount of leeway to parties and their counsel to argue their case without fear of prosecution, both the legislative and the judicial process generally depend on accuracy and completeness. Thus, the Department strongly supports the amendment of section 1001 to punish false statements that are made to all three branches of the Federal Government, and both S. 1734 and the proposal which we transmitted to Congress on December 28, 1995—a proposal that is very similar to H.R. 3166, introduced in the House on March 25—would do so.

Like the Department's proposal, S. 1734 would codify what has been known as the "judicial function exception." The judicial function exception, which was originally created by the courts, excluded from the false statement statute many statements that were made in connection with judicial proceedings. The courts that adopted the judicial function exception did so because of concerns about the potential chilling of advocacy before the courts that might occur if attorneys and parties, particularly in criminal cases, were subject to prosecution for concealing or omitting certain facts from a court or jury. Those courts found that Congress must have intended such an exception when it enacted section 1001.

The Department of Justice agrees with the principles underlying the judicial function exception. Unlike the Legislative and Executive branches, the courts do not engage in general information gathering. Instead, the work of the Judicial branch is conducted through an adversarial process in which specific disputes are resolved between specific parties. The judicial process provides powerful mechanisms, such as cross-examination and rebuttal, to test the veracity of information that is presented. Moreover, it is only in the courts that criminal charges are presented and defend-

ants are afforded the constitutionally protected right to adequate counsel and a fair defense. For these reasons, the Department of Justice supports a limited judicial function exception that will protect against the chilling of advocacy in the Federal courts.

However, this exception should be limited to the extent necessary to prevent chilling of vigorous advocacy. Thus, it should be clear and unambiguous so that defendants, prosecutors, and the courts will have adequate notice as to which statements fall within the exception, and should be limited to those situations and those individuals for which it was intended, based upon the principle of protecting zealous advocacy in an adversarial setting.

In our view, the judicial function exception contained in our proposed legislation would achieve these goals more effectively than the language in S. 1734. The applicability of the exception in S. 1734 turns on whether the false statement was made to a court in connection with the performance of an "administrative" or an "adjudicative" function. If the statement was made to the court concerning an adjudicative function, then section 1001 would not apply; if the statement was made to the court in an administrative or housekeeping function, then section 1001 would apply.

However, the distinction between adjudicative and administrative functions is hazy at best, as courts found when applying the judicially created exception to section 1001. For example, under the judicially created exception, giving a false name to a magistrate during a plea hearing was held to be prosecutable because it was administrative, *see United States* v. *Plescencia-Orozco*, 768 F.2d 1074 (9th Cir. 1985), but giving a false name to a magistrate in a removal/bail hearing was held to be outside the scope of section 1001. *See United States* v. *Abrahams*, 604 F.2d 386 (5th Cir. 1979). These cases highlight the difficulty of maintaining the administrative/adjudicative distinction, and the Department of Justice believes that this approach should be abandoned.

We have submitted proposed language that would codify the judicial function exception to section 1001 without relying on the distinction between adjudicative and administrative functions. The Department of Justice proposal provides:

"This section shall not apply to parties to a judicial proceeding, or their counsel, for statements, representations or documents submitted by them to a judge or judges in the judicial proceeding."

We believe that this language would provide clear guidance on which false statements may be prosecuted under section 1001 and which statements may not, since it depends solely on the identity of the person making the statement and the person to whom it is made.

We also believe that this language will satisfy the Department of Justice's second concern—that the judicial function exception be limited to those situations and individuals necessary to preserve zealous advocacy before the courts. First, only parties and their counsel will be protected by the exception. Given that the purpose of the judicial function exception is to prevent the chilling of advocacy, we believe that there is no reason to protect false statements submitted by individuals who are not parties or counsel in a judicial proceeding. For example, when a person who is not a party submits a false document to a court in connection with a criminal sentencing, we believe that such a person should be subject to prosecution under section 1001. Under S. 1734, that person would fall within the judicial function exception, and could not be prosecuted.

The second way in which The Department of Justice proposal would limit the scope of the judicial function exception to those instances where it is necessary is by making clear that it applies only to statements submitted to a judge or judges. This limitation is important for two reasons. First, we believe that false statements that are made to other entities within the Judicial branch—including the Administrative Office of the Court, the United States Probation Office, and grand juries—should be subject to prosecution.

Second, it is important to ensure that the judicial function exception is not interpreted to immunize false statements made to law enforcement officers in connection with judicial proceedings. For example, one Federal appeals court used the judicial function exception to reverse the conviction of an individual who lied to FBI agents simply because the agents were involved in a grand jury investigation. *See United States* v. *Wood*, 6 F.3d 692 (10th Cir. 1993). There is no reason to protect such conduct, and the Department of Justice proposal would ensure that it would not be protected by the judicial function exception.

Finally, I would also like to note that both S. 1734 and the Administration proposal would expressly include materiality as an element under each of the three clauses of section 1001. We support this amendment. There is presently a conflict of circuits on this issue. *See United States* v. *Gaudin*, 115 S.Ct. 2310, 2320–21 (1995) (Rehnquist, C.J., concurring). We do not believe that a requirement of mate-

riality would significantly hinder law enforcement, and it would ensure that Section 1001 was applied in cases where the false statement had the capacity to affect the proceedings.

18 U.S.C. § 1515 (definition of "corruptly" in Section 1505)

S. 1734 also includes a provision defining the word "corruptly" in 18 U.S.C. § 1505, one of the obstruction of justice statutes. This definition is intended to address problems raised by the decision of the Court of Appeals in *United States* v. *Poindexter*, 951 F.2d 369 (D.C. Cir. 1991), *cert. denied*, 506 U.S. 1021 (1992). In *Poindexter*, the court reversed the conviction of former National Security Advisor John Poindexter for obstruction of justice under 18 U.S.C. § 1505, holding that the term "'corruptly' is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress." *Id.* at 379. While we disagree with that decision, we believe that it is appropriate to amend the statute to prevent the problem from arising again.

S. 1734 would add three things to the definition of the term "corruptly." First, it would make clear that a person may act corruptly—and thus be convicted of obstruction of justice—even if the person acts alone, rather than through another person or official. The Department of Justice supports this clarification. It would, we believe, cure the defect perceived by the Court of Appeals in *Poindexter. See United States* v. *Kelley*, 36 F.3d 1118, 1127–28 (D.C. Cir. 1994).

Second, S. 1734 would require that the defendant have acted with an "improper purpose." Adding improper purpose as an element of a criminal offense raises serious concerns. First, it is very difficult to define which purposes are proper and which are improper. Moreover, such a provision would permit a defendant to argue that he or she could not be convicted so long as he or she could identify or manufacture an overriding purpose for the conduct that was "proper"—such as exercising free speech, defending an important belief, or protecting the national security—even if he or she is, in fact, intending to obstruct justice. In addition, the "improper purpose" test would apply even to the conduct which *Poindexter* found could properly be prosecuted under section 1001, namely influencing the testimony or actions of another. We must be able to prosecute individuals who engage in knowing and willful criminal conduct, regardless of their overall purpose.

Finally, S. 1734 lists several specific types of conduct, such as making a false statement and withholding a document, that would be "corrupt" under section 1505. The Department of Justice agrees that the types of conduct listed are among the ways in which a person can act corruptly. Through the years, however, we have seen that there are many ways in which a person can act corruptly, and such a list of conduct should not be interpreted as the only types of conduct that qualify as corrupt. Providing any such list will invite a court to decide whether other conduct should be prohibited by comparison to the list rather than to the concept of "corruptly."

More importantly, the term "corruptly" is used in the criminal code to define the state of mind with which the defendant must act, and not simply the acts that the defendant must engage in. The term "corruptly" serves this purpose in several places in the criminal code, including the bribery and obstruction of justice provisions (18 U.S.C. §§201, 666, 1503, 1505, 1512). Because the term has been used in the criminal code for many years, it has a long history in the courts. Consequently, the Department of Justice is concerned about the potential impact of the proposed definition of the term "corruptly" which focuses on listing a few types of conduct that fall within the scope of that term as it is used in one criminal provision.

Thus, we believe that the only change to the definition of the term "corruptly" that is necessary in response to the *Poindexter* case is to clarify that a person can act corruptly either alone or through others.

28 U.S.C. § 1365

Section 4 of S. 1734 would amend 28 U.S.C. § 1365, which establishes the authority of the Senate to enforce a Senate subpoena issued to a Federal official. 28 U.S.C. § 1365 authorizes the Senate to enforce its subpoenas in court, but it is inapplicable to subpoenas to the executive branch, because it expressly excludes from its authorization an action to enforce a subpoena "issued to an officer or employee of the Federal Government acting within his official capacity." Section 4 of S. 1734 would amend section 1365 to prevent enforcement of Senate subpoenas issued to Federal officials only when the head of the official's department or agency has directed the official not to comply based upon an executive branch privilege or objection. The Department of Justice opposes this expansion of the Senate's authority to enforce subpoenas against the executive branch. We believe that these disputes should be resolved between the two branches and not brought before the courts.

18 U.S.C. § 6005

Finally, Section 5 of S. 1734 would amend the provision under which Congress may compel immunized testimony from witnesses, 18 U.S.C. § 6005, by making clear that testimony may be compelled "ancillary to" a proceeding before a committee or subcommittee. The Department of Justice has no objection to such an amendment, which will essentially conform section 6005 to section 6002. Section 6002 already contains the phrase "ancillary to." Given the risks that immunized testimony may pose to criminal prosecutions, however, we note the significance of the requirement that the Attorney General be provided with ten days advance notice of any request for immunity.

I would be pleased at this time to answer any questions which you may have.

Senator SPECTER. Mr. Griffith, welcome. Thank you for joining us.

STATEMENT OF THOMAS B. GRIFFITH

Mr. GRIFFITH. Thank you, Mr. Chairman. Thank you for the invitation to discuss S. 1734, the False Statements Penalty Restoration Act. The Senate Legal Counsel has a statutory charge to advise committees regarding their investigative powers. I will address how S. 1734 might affect those powers. I have prepared a longer written statement that has been submitted previously to the committee.

Senator SPECTER. It will be placed in the record, without objection.

Mr. GRIFFITH. Thank you. At the outset, however, I should point out that because the Office of Senate Legal Counsel may be called upon at some point in time to participate in litigation involved the provisions of the proposed Act or the statutes they would amend, I must refrain from endorsing or criticizing the measures before you.

Senator SPECTER. Why is that?

Mr. GRIFFITH. If, in fact, we are called upon to provide a defense to these acts as Senate Legal Counsel, it might be untoward if——

Senator SPECTER. What?

Mr. GRIFFITH. It might be untoward if the first thing that we meet in court is a statement criticizing the very Act that we are called upon to defend.

Senator SPECTER. Well, that might cover criticism, but how about compliments?

Mr. GRIFFITH. I think you will see, by implication, some compliments in the proposed legislation.

The power to investigate is inherent in Congress' constitutional power to legislate. To fulfill its constitutional function, Congress must be able to rely upon the information it receives during the course of its investigations. Section 2 and 3 of the Act seek to restore important criminal protections upon which congressional investigators have relied for the last 40 years, but which recent court decisions have called into question.

Section 2 would amend the False Statements Act and restore felony criminal sanctions to unsworn false statements made to congressional investigators, sanctions which the Supreme Court held last year in *Hubbard* were no longer available. Restoring to Congress the protections of the False Statements Act would be significant.

Prior to *Hubbard,* prosecutors obtained felony convictions against witnesses who knowingly made false material statements to committees in the following circumstances: unsworn testimony to a

committee, oral statements to committee members, oral statements to committee staff, written submissions accompanying testimony to a committee, written statements in a letter responding to committee inquiries.

After *Hubbard,* however, these forms of false statements will very likely go unpunished in the absence of legislation. Without such legislation, the only felony sanction available against those who knowingly make false statements to Congress is the perjury statute. The perjury statute, however, applies only where a sworn statement is made before a competent tribunal. Most statements made to congressional investigations are unsworn.

The Supreme Court has held that a congressional committee is a competent tribunal for purposes of the perjury statute only when a quorum of its members is present at the time of the false sworn statement. Now, there are several committees to which the Senate has given staff deposition authority and which do not need to have a member present at the time the sworn false statement is made to sustain a perjury——

Senator SPECTER. You say there must be a quorum present before a statement is prosecutable?

Mr. GRIFFITH. Under the perjury statute.

Senator SPECTER. Under the perjury statute?

Mr. GRIFFITH. Yes, sir. Under the *Christoffel* case decided in 1949 by the Supreme Court, they held that the competent tribunal portion of perjury statute is only found when there is a quorum of the committee that is present at the time the false statement is made. That provides a significant——

Senator SPECTER. I am going to have to check with the stenographer to see if these notes reflect whether or not there is a quorum present now, or customarily whether her notes reflect whether a quorum is present. When I see the records of hearings, they list the members who are there, but I have noticed that they are listed if they are present for only a few minutes.

Let the record show there is a nod from the stenographer. I don't know what that means exactly, but let the record show it.

Proceed, Mr. Griffith.

Mr. GRIFFITH. Thank you. There are several committees to which the Senate has given deposition authority, and in those instances the Senate has decided that a quorum is present when the staff takes the deposition.

Senator SPECTER. May the Senate do that?

Mr. GRIFFITH. They may.

Senator SPECTER. May the Senate decide that a quorum is present when a quorum is not present?

Mr. GRIFFITH. The Supreme Court has given the Senate wide latitude in determining its quorum requirements. Under Rule XXVI of the Standing Rules of the Senate——

Senator SPECTER. Well, the Senate is governed by more than the Supreme Court decisions.

Mr. GRIFFITH. That is right. That is right, Senator Specter.

Senator SPECTER. In fact, the Supreme Court doesn't interfere with Senate procedures at all, does it?

Mr. GRIFFITH. Right, and in Rule XXVI of the Standing Rules, the Senate has given to each committee the authority to determine

its quorum, down to a quorum of one for the purpose of taking testimony, and many committees of the Senate have done that.

Senator SPECTER. It sort of vitiates the point of the statute, doesn't it, requiring a quorum to be present?

Mr. GRIFFITH. Well, I don't believe so. I believe that it is a recognition that if the Senate establishes quorum rules, quorum requirements, it must abide by them to be a competent tribunal. In the *Christoffel* case, the committee had a quorum requirement that was not met at the time the testimony was taken.

The important point here is to recognize that the perjury statute, which is the only thing prosecutors are left with after *Hubbard,* is not the neatest fit for the way the Senate conducts its business. For most committees, there can be no perjury conviction absent a quorum. I think that is a significant impediment for committees to carry on their business and one reason why S. 1734 is a significant addition to the committees' powers.

In conclusion, permit me to say a word about Sections 4 and 5 of the proposed Act. I notice my time is expired. If I might, I would like to have an extra——

Senator SPECTER. The lights just expired, so your expired time doesn't show anymore. Go ahead.

Mr. GRIFFITH. Okay. I will just be very brief.

The Office of Senate Legal Counsel has had direct involvement in the matters those sections address. Sections 4 and 5 were originally part of a bill passed by a voice vote of the Senate in 1988 which was later favorably reported by the House Judiciary Committee, but failed to garner the two-thirds needed for passage in the House on a suspension vote.

These measures respond to problems recent congressional investigators have encountered. Each would enhance the ability of Senate investigators to obtain information. Section 4 makes clear that the Federal district court in Washington, D.C., has jurisdiction to enforce all properly authorized Senate subpoenas except those directed at executive branch officials and employees, buy it makes clear that that exception applies only when the head of the executive branch department or agency has instructed the official or employee who has received the subpoena not to comply with its terms on the basis of executive privilege.

Section 5 makes clear that when a congressional committee grants use immunity to a witness who has invoked his or her Fifth Amendment protection against self-incrimination, that immunity extends not only to testimony before a quorum of the committee, but also to statements made in authorized staff depositions. Considering the significance of staff depositions in congressional investigations in recent years, we think that, as well, is a significant clarification of the law that will enhance the power of Senate committees to do their work.

Senator SPECTER. Mr. Griffith, had this bill been passed before your testimony, would a false statement in your testimony be prosecutable?

Mr. GRIFFITH. Had 1734 not been passed? I am sorry?

Senator SPECTER. Had it been passed and were it enacted prior to your testimony, would false statements in your testimony be prosecutable under it?

Mr. GRIFFITH. I believe they would if it was knowingly and willfully made and it was material.

Senator SPECTER. Do you think I made a mistake in not swearing you in?

Mr. GRIFFITH. I am confident.

[The prepared statement of Mr. Griffith follows:]

PREPARED STATEMENT OF THOMAS B. GRIFFITH

Mr. Chairman and Members of the Committee on the Judiciary:

Thank you for the invitation to discuss S. 1734, the proposed False Statements Penalty Restoration Act. The statute that created the Office of Senate Legal Counsel directs the counsel to "advise, consult, and cooperate with * * * any committee or subcommittee of the Senate in promulgating and revising their rules and procedures for the use of [C]ongressional investigative powers and with respect to questions which may arise in the course of any investigation." 2 U.S.C. § 288g(a)(6). Consistent with the duty of the Senate Legal Counsel to advise committees regarding their investigative powers, I am pleased to discuss with the Committee the historical background of the measures contained in the proposed Act as well as the uses to which Congress might put them. However, because the Office of Senate Legal Counsel may be called upon at some point to participate in litigation involving the provisions of the proposed Act or the statutes they would amend, I must refrain from endorsing or criticizing the measures before you.

The power to investigate is inherent in Congress's constitutional power to legislate. *Watkins* v. *United States*, 354 U.S. 178, 187 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135, 174 (1927). To fulfill its legislative duties, Congress must be able to rely upon the information it receives from private parties, state officials and employees, and officials and employees of the other branches of the federal government. Without accurate information, Congress would be unable to determine the need for new laws, the effect of the performance of the executive in enforcing those laws, or any other of its constitutional functions.

Because Congress requires accurate information to perform its constitutional functions, it has enacted various criminal statutes, which have provided some measure of protection against those who knowingly provide false information to Congress.[1] Those protections include:

The False Statements Act, 18 U.S.C. § 1001, which imposes felony criminal penalties upon anyone who knowingly and willfully makes a false or fraudulent statement to a "department" or "agency" of the federal government. In 1995, the Supreme Court held that this statute did not apply to false statements made to the judiciary, raising serious doubts about its applicability to false statements made to Congress. S. 1734 would amend section 1001 to make it applicable to false statements made to the judicial and legislative branches of the federal government.

The perjury statute, 18 U.S.C. § 1621, which imposes felony criminal penalties upon a witness who provides testimony to a Congressional committee, knowingly and under oath, that is false and material to the proceedings.

The obstruction of justice statute, 18 U.S.C. § 1505, which provides felony criminal penalties for any person who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes" a Congressional inquiry. In 1991, a divided panel of the U.S. Court of Appeals for the D.C. Circuit held that the use of the word "corruptly" in section 1505 is unconstitutionally vague. The legislation under consideration today attempts to address the court's concern.

The criminal contempt of Congress statute, 2 U.S.C. §§ 192 and 194, which permits either House of Congress to certify to the U.S. Attorney that a witness has willfully refused to testify or to produce documents requested by any of its committees or subcommittees. Criminal contempt of Congress is a misdemeanor offense and carries a jail sentence of not more than twelve months and a fine of not more than

[1] In addition to these statutory protections, each House of Congress has the inherent power to hold a contumacious witness in contempt before its own bar. Neither House has exercised this power in over fifty years, presumably finding the process of trying a witness too burdensome.

$100,000.[2] In recent years, section 192 has been used most commonly in plea agreements for defendants seeking to avoid felony charges of perjury or false statements.[3]

1. Amendments to 18 U.S.C. § 1001

Section 1001 of Title 18 of the U.S. Code provides criminal penalties for anyone who:

[I]n any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry.

Section 1001 principally offers protection in the form of felony criminal penalties against false, unsworn oral and written statements made to "any department or agency of the United States." From 1955 until last spring, the federal courts consistently applied section 1001 to false statements made to each of the three branches of the federal government: the Congress, the judiciary, and the executive. Last year, however, the Supreme Court held that section 1001 did not apply to the judiciary. The Court's reasoning cast serious doubt upon the applicability of section 1001 to false statements made to Congress. S. 1734 would amend section 1001 and make criminal again materially false statements made knowingly and willfully to Congress and the judiciary.

In *United States* v. *Bramblett,* 348 U.S. 503, 504 (1955), the Supreme Court reversed a district court's dismissal of section 1001 charges against a Member of Congress accused of filing a false payroll claim with the House Disbursing Office. Interpreting a Title 18 provision defining "department" as "one of the executive departments * * * unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government," 18 U.S.C. § 6, the Court concluded that section 1001 ought to apply to each of the three branches of government. Id. at 509.

From 1955 to 1995, section 1001 was used to charge or convict a number of persons who made false statements to Congressional investigators. These false statements were made in a number of forms: written submissions accompanying testimony to a committee, unsworn testimony to a committee, oral statements to committee members, oral statements to committee staff, and written statements in a letter responding to a committee inquiry. In addition, section 1001 has been included in indictments to buttress charges of deceiving or defrauding Congress under other statutes.

In 1995, the Supreme Court rejected its prior reasoning in *Bramblett*, and held that section 1001 did not apply to the judiciary because it was not a department or agency of the United States. *Hubbard* v. *United States,* 115 S. Ct. 1754 (1995). Although *Hubbard* involved only an allegedly false statement made to a court in a bankruptcy proceeding, Chief Justice Rehnquist's dissent, each of the courts that have considered the applicability of section 1001 to Congress in the wake of *Hubbard*, and numerous commentators have read the Court's opinion as depriving Congress of the protection that had been afforded by section 1001 since *Bramblett*.[4]

Recently, two courts, relying on *Hubbard,* overturned convictions under 1001 involving false statements that had been made to Congressional committees. One case involved an executive branch official who had been convicted of concealing material facts in testimony before a Senate committee. The other case involved a business executive who had been convicted of submitting false written information to a Senate subcommittee.

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[2] Although 2 U.S.C. § 192 specifies a maximum fine of only $1,000, 18 U.S.C. § 3571 provides that the fine imposed on one convicted of a misdemeanor punishable by imprisonment of not more than one year is $100,000 unless the statute defining the crime "by specific reference, exempts the offense" from the terms of section 3571. Section 192 does not exempt itself from the application of 18 U.S.C. § 3571.

[3] In 1978, the Congress, as part of the Ethics in Government Act of that year, enacted a provision for the civil rather than criminal enforcement of Senate subpoenas. 28 U.S.C. § 1365. In no instance since the creation of this alternative has the Senate certified a criminal contempt for failure to comply with a subpoena, opting on each occasion to pursue civil enforcement over criminal penalties.

[4] The General Accounting Office (GAO) has argued recently that *Hubbard* does not eliminate section 1001 coverage for Congressional "agencies" and has asserted that the GAO is such an agency. Letter from Robert P. Murphy, General Counsel, General Accounting Office, to the Honorable William F. Clinger, Jr., Chairman, House Committee on Government Reform and Oversight (January 17, 1996). The DOJ has advanced similar arguments in court to no avail. Each of the courts considering the issue concluded that *Hubbard* excludes the legislative branch in its entirety from the scope of section 1001.

Without the use of section 1001, the perjury statute, 18 U.S.C. § 1621, becomes the principal criminal sanction available against a witness who makes a false statement to a Congressional investigator. A perjury conviction, however, requires at least two proofs not required by section 1001: the false statement must be made (1) under oath, and (2) before a competent tribunal. Without the protection of section 1001, then, only witnesses who present sworn testimony to a quorum of the committee and sworn deposition witnesses[5] face a felony criminal sanction for knowingly making false statements.

But much of a committee's investigative work is done prior to hearings. Hearings, although necessary to develop appropriate legislation, are only one step in the process by which Congress gathers and analyzes the information it needs to legislate. Long before a hearing takes place, committee members and staff will have many discussions with potential witnesses and other sources for information. In fact, the decision whether to conduct a hearing at all may be based upon facts gathered through unsworn oral and written statements. Because Congress depends upon the truthfulness of all the information it gathers, Congress may determine to make criminal any knowingly false, material statements made to its committee members and staff during the conduct of their oversight and investigatory functions.

2. Amendments to 18 U.S.C. § 1515

The criminal obstruction statute, 18 U.S.C. § 1505, provides criminal penalties for any person who "corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede * * * the due and proper exercise of the power of inquiry" of Congress and its committees. *Id.* In *United States* v. *Poindexter,* 951 F. 2d 369 (D.C. Cir. 1991), a divided panel of the United States Court of Appeals for the D.C. Circuit held that the use of the word "corruptly" to describe the manner in which a defendant must "influenc[e]" a Congressional inquiry under section 1505 was unconstitutionally vague. *Id.* at 379. The court further held that section 1505 applies only to persons who attempt to influence Congress indirectly through another person, and not to witnesses themselves. The proposed amendment to section 1515 has two purposes: (1) to provide a clear definition of "corruptly," and (2) to apply section 1505 to actions taken "personally" to obstruct inquiries in addition to actions taken to "influenc[e] another" to do so.

In other federal circuit courts, section 1505 and related federal obstruction of justice statutes are thought to cast a wide net, covering such activities as bribery, blackmail and perjury. These courts hold it to be a "well-established rule that the omnibus clauses of federal obstruction statutes should be broadly construed." *United States* v. *Mitchell,* 877 F. 2d 294, 298 (4th Cir. 1989); *United States* v. *Laurins,* 857 F. 2d 529, 536 (9th Cir. 1988), *cert. denied,* 492 U.S. 906 (1989); *United States* v. *Browning,* 572 F. 2d 720, 725 (10th Cir.), *cert. denied,* 439 U.S. 822 (1978). This rule of broad construction ensures that penalties are available for "the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined." *United States* v. *Mitchell,* 877 F. 2d at 299 (quoting *United States* v. *Griffin,* 589 F. 2d 200, 206–07 (5th Cir.), *cert. denied,* 444 U.S. 825 (1979)).

In *Poindexter,* the D.C. Circuit concluded that section 1505 cast too wide a net—that "in the absence of some narrowing gloss * * * [the term "corruptly" in section 1505 is so vague that] people must 'guess at its meaning and differ as to its application.'" 951 F. 2d at 378. Reviewing the legislative history of the statute in search of restrictions that would eliminate its vagueness, the D.C. Circuit decided that the statute applied only to those attempting to influence Congress indirectly through another person, and not to witnesses themselves. *Id.* at 381.

Although no other federal circuit court has followed *Poindexter,* its interpretation of section 1505 governs cases in the D.C. Circuit, which is where most persons accused of obstructing a Congressional inquiry would be tried. Accordingly, legislation is needed if Congress believes that the criminal obstruction statute should apply to witnesses themselves, rather than only to persons attempting to obstruct a Congressional investigation indirectly through another person.

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[5] *Christoffel* v. *United States,* 338 U.S. 84 (1949), holds that there is no competent tribunal in the absence of a quorum of the committee present during the false testimony. The quorum requirement does not apply in those instances where the Senate has authorized committees to compel the attendance of witnesses at staff depositions taken under oath. Currently, the only committees with that authority are: the Standing Committees on Indian Affairs and Governmental Affairs; the Special Committee on Aging; the Select Committees on Ethics and Intelligence; the Permanent Subcommittee on Investigations, and the Special Committee to Investigate Whitewater Development Corporation and Related Matters.

3. Amendment to 28 U.S.C. § 1365

Section 1365 of Title 28 enables the Senate or an authorized Senate committee or subcommittee to seek civil enforcement of its subpoena in federal court to secure testimony or the production of documents. Section 1365 excludes from its scope any subpoena issued "to an officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1365(a). S. 1734 seeks to clarify that this exception applies only to an officer or employee of the executive branch who has been directed by the head of his or her agency or department not to comply with the subpoena because of an official government privilege.

The proposed amendments to section 1365 and to 18 U.S.C. § 6005 (discussed below) were initially recommended in the Report of the Congressional Committees Investigating the Iran-Contra Affair, S. Rep. No. 216 and H.R. Rep. No. 433, 100th Cong., 1st Sess. 426 (1987) (Recommendation 20). These two proposals were part of a bill passed on unanimous consent by the Senate in 1988. 134 Cong. Rec. 21232–35, 100th Cong., 2d Sess. (1988). The House Judiciary Committee reported the bill favorably, H.R. Rep. No. 1040, 100th Cong., 2d Sess. (1988), but it failed to garner the two-thirds needed for passage in the House on a suspension vote.

Section 1365 was enacted as part of the Ethics in Government Act of 1978. Early drafts of that legislation did not include an exception for federal government officers and employees acting within the scope of their duties. Section 1365 was largely a response to the district court's dismissal for lack of jurisdiction, of the Ervin Committee's request for a declaratory judgment regarding the lawfulness of its subpoena of President Nixon's tape recordings. *See Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973). Thus, one of the original purposes of the statute was to confer jurisdiction upon courts to determine the validity of Congressional requests for information from the executive branch.

During the course of the debates regarding this legislation, the executive branch strongly opposed conferring jurisdiction upon the federal courts to decide such sensitive issues between Congress and the executive branch. In testimony before a subcommittee of the Senate Committee on Governmental Operations, then-Assistant Attorney General Antonin Scalia argued that weighing the legislature's need for information against the executive's need for confidentiality is "the very type of 'political question' from which * * * the courts [should] abstain." Executive Privilege—Secrecy in Government: Hearings Before the Subcom. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 117 (1975). In response, Congress amended the proposed legislation to exclude from its ambit federal officers and employees acting in their official capacity. However, as noted in a report from the House Judiciary Committee in 1988, the exclusion was to apply only in cases in which the President had directed the recipient of the subpoena not to comply with its terms. Clarifying the Investigatory Powers of the United States Congress, H.R. Rep. No. 100–1040, at 2.

In the years since the statute took effect, at least one executive branch employee has argued that section 1365 permitted him to interpose purely personal defenses unrelated to executive privilege, such as the privilege against self-incrimination, to block jurisdiction over the controversy in court. This argument is inconsistent with the intent of section 1365, and we do not believe that it is a correct interpretation of the statute as it is currently written. The proposed legislation would be instrumental nonetheless in clarifying that a federal officer or employee cannot interpose personal defenses to block jurisdiction under 28 U.S.C. § 1365. It would do so by applying the exception to section 1365 only when the head of the department or agency employing the executive branch witness has directed him or her not to comply with the subpoena on the basis of executive privilege and has identified the privilege.

4. Amendment to 18 U.S.C. § 6005

Under 18 U.S.C. § 6005, either House of Congress or any of its comments can obtain a federal court order conferring use immunity upon a witness called to testify in "any proceeding before" the Congress or any of its committees or subcommittees. In recent years, some witnesses who have been granted immunity pursuant to section 6005 have nevertheless refused to provide testimony in authorized staff depositions, arguing that the phrase "any proceeding before" refers only to testimony provided at a committee hearing with a quorum present, and not to staff depositions.

Under 18 U.S.C. § 6003, immunity in judicial proceedings applies to witnesses "before or ancillary to" a court or grand jury. As the Office of Senate Legal Counsel noted in a 1988 letter to Senator Inouye, subsequently printed in the Congressional Record, 134 Cong. Rec. 9529 (1988), one witness called to appear before a Congressional committee seized upon the inclusion of the phrase "ancillary to" in section 6003 and its exclusion from section 6005 to argue that immunity does not extend

to witnesses testifying in an authorized staff deposition. Although granted immunity pursuant to section 6005, the witness nevertheless refused to be deposed. Although we believe that section 6005 immunity orders do confer immunity upon witnesses for statements made in an authorized staff deposition, the proposed legislation would clarify the law and avoid time-consuming resistance from witnesses at depositions. This clarification would strengthen the ability of committees to carry on their investigations with an important tool: the staff deposition.

Where authorized by the Senate, committee staff depositions have become increasingly important tools for gathering facts to use in Congressional investigations. Because they may be conducted without the presence of Members, depositions enable committee staff to gather facts independently, thereby conserving the time of Members. Depositions help committee investigators prepare Members for hearings. Information obtained through staff depositions helps investigators determine whether an immunized witness should be called to testify at a committee hearing.

Senator SPECTER. Professor Tiefer, we welcome you here. I am told that that very impressive book is yours on congressional procedures. Is that true?

STATEMENT OF CHARLES TIEFER

Mr. TIEFER. Thank you, Mr. Chairman. It is true.

Senator SPECTER. Would you mind if I took a look at it while you are testifying?

Mr. TIEFER. It is 1,000 pages, Mr. Chairman.

Senator SPECTER. Your statement will be made a part of the record provided it is shorter than that, Professor.

Mr. TIEFER. Thank you, Mr. Chairman, for the opportunity to testify on this bill, which is a non-controversial yet important requirement for Congress to obtain the information it needs for legislating and oversight.

My own viewpoint is as a professor and as the author of the treatise and as a representative of witnesses in major investigations, so I am sensitive to both witnesses' rights and, as deputy House counsel in 1994 and 1995, sensitive to the concerns of Representatives who are also subject to proceedings under this statute.

I explain in my written statement and need not go into at length as to the necessity to have this bill because, as Woodrow Wilson said, and the Supreme Court has quoted, "unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the Government"—and that means unless Congress can get true statements in its oversight investigations—the country would be helpless to learn how it is being served and would be in what Woodrow Wilson called "embarrassing, crippling ignorance of its affairs."

Now, I have described a safeguard that I think would be appropriate formally or informally under this statute, and I will explain why there might be a need for one. Representative Martini may be enthusiastic about subjecting Representatives to prosecutorial targeting for their financial disclosure statements, but Representatives, like other congressional witnesses, have some concerns in this regard, less that they will be indicted and convicted, but for simply being criticized for something they say by, say, a newspaper story that they could then have the label that they are a criminal investigation target pinned on them.

If, say, their opponent in a campaign says, well, the newspaper said this, I am calling the Justice Department and telling them to start a proceeding——

Senator SPECTER. Are you disagreeing with Congressman Martini's conclusion that statements in the Financial Disclosure Act are subject to the penalties of this bill?

Mr. TIEFER. I am agreeing with him in that regard, yes.

What I think might informally or formally be understood is that there be a threshold requirement before investigations be commenced that the committee of the legislative branch by majority vote refer the matter for investigation or prosecution. It is similar to the threshold that contempt investigations don't start unless the House or the Senate votes it. Immunities aren't granted without a vote of the committee. Independent counsel requests aren't made without majority vote of the majority and minority members, et cetera, et cetera. That way, a witness or a Representative would know that a responsible body such as the House Standards Committee must consider the matter before he gets the label "criminal investigation target" pinned on him.

For the reasons I have discussed, I think the bill is a non-controversial but important measure for restoring Congress' authority to obtain truthful information. I would just say regarding the chairman's questions that the Senate has by rules provided that for testimony a quorum is one Senator, and that rule is valid. So that is why your presence here is sufficient to make this a competent tribunal for perjury or false statement purposes. One Senator suffices under the Senate's rules.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tiefer follows:]

PREPARED STATEMENT OF CHARLES TIEFER

Mr. Chairman and Senators: Thank you for the opportunity to testify on this bill restoring the obligation of witnesses to provide truthful statements to Congress, a noncontroversial yet important requirement for Congress to obtain the information it needs for its constitutional missions of legislating and conducting oversight.

Mine is a balanced view on this, as an academic witness with awareness both of the public's needs and of the legitimate fairness concerns of Congressional witnesses. Accordingly, while I applaud the bill as a noncontroversial yet important measure, I will also note the safeguards the bill does, or should, provide for Congressional witnesses.

The leadership shown by the bill's sponsors

Let me begin by adverting to the impressive leadership shown by the principal sponsors of this bill and the committee conducting this hearing. After all, what this bill and this hearing accomplish is not what wins quick accolades for Senators: the bill confers no monetary or other direct benefits on a grateful interest group, nor does it come down hard on street crime or some other unpopular element. it is that kind of governmental reform that Senators must devote themselves to, rather thanklessly, in fulfillment of their responsibility to the legislative enterprise.

So Senators Specter and Levin for introducing the bill, Senators Hatch and Biden for providing this hearing for the bill, and the Senators who have joined in cosponsoring the bill, deserve credit as part of a tradition of those Senators who have in the past periodically restored and updated the Congress's process for obtaining truthful information. These Senators are in the tradition—

Of Vice President Thomas Jefferson, who wrote in his manual on Senate procedure in 1797–1801 about what was needed for effective legislative proceedings;

Of the wise Senatorial authors of such legislative milestones as the 1857 Congressional contempt statute, the 1950's code of rules of witness' rights, and the Ethics in Government Act of 1978;

And in our time, of Senators Nunn, Cohen, Levin, Roth, and Glenn, who have done so much on the Governmental Affairs Committee, the standing committee of the Senate for investigation, to achieve the ideal of the Senate investigation that is both potent is getting to the truth, and fair to the rights of the witnesses.

Taking a balanced viewpoint

My own viewpoint is not that of a zealous or one-side enthusiast for unbridled Congressional power. I am now an associate professor of law at the University of Baltimore Law School, and I am the author of the thousand-page treatise, Congressional Practice and Procedure (Greenwood Press 1989), so mine is the academic viewpoint. During this Congress, I have represented witnesses before several major House investigations of this Congress, such as—

Senator Leahy's former counsel, John Podesta, subsequently Assistant to the President and White House Staff Secretary, who testified with honors at a major House hearing last December;

And, Joyce Sparks, the Texas state social worker who testified at length at a key House hearing about Waco. Accordingly, I have had a thorough regrounding in the legal concerns of Congressional witnesses, and their proper concern that statutory- and rule-provided protections stand between them and kind of oppression and abuse, the persecution and prosecution of witness for crass political purposes, which was found in Congressional investigations during the McCarthy era.

Let me note for the record my prior background. I was Assistant Senate Legal Counsel in 1979–1984 serving under the uniquely balanced and value-sensitive tutelage of Senate Legal Counsel Michael Davidson, with work including—

A detail as counsel to the Senate Judiciary Committee's Billy Carter Investigation of 1980 under the able leadership of Senators Thurmond and Simpson, and Bayh, Kennedy, Biden, and Leahy, working alongside such well-known Senate Judiciary staff counsels as Duke Short, Judge Dennis Shedd, and Justice Steven Breyer;

Assisting roles ranging from advising Senators Hatch and DeConcini's oversight in their Judiciary Subcommittee of the Public Integrity Section in 1980, to obtaining writs for Senator Specter's Juvenile Justice investigations of the early 1980s;

And House Deputy General Counsel and Solicitor in 1984–95 under the tireless and insightful General Counsel Steven R. Ross, so, I personnally argued and briefed in court many of the key litigated cases of the past 17 years regarding Congressional investigations, starting with the first and second contempt cases under the Senate civil enforcement statute in 1980-84 for Senators Nunn and Roth.

I was also Special Deputy Chief Counsel of the House Iran-contra Investigation of 1987 working with Senators Inouye and Rudman.

As one who has been a participant and an academic, in the courtroom and the hearing room, in investigations in the Senate and the House, and counsel both on the podium side and at the witness table, I hope to present the viewpoint of how vital it is that Congress have what this bill would restore—the authority and the tools to obtain the truthful information it needs for its constitutional missions—while, a the same time, there is safeguarding of the vulnerable position of witnesses against the danger of unfairness.

Restoring the False Statement's Act's applicability to congressional witnesses: Noncontroversial in light of this bill's narrow purpose

This bill's section amending 18 U.S.C. § 1001 to apply expressly to "any matter within the jurisdiction of the * * * legislative * * * branch" simply restores the False Statement's Act applicability to statements made to the legislative branch to what it was before the Supreme Court's 1995 Hubbard decision. *Hubbard* v. *United States*, 115 S. Ct. 1754(1995).

There is little reason to question the necessity to restore in some measure the applicability of the false statements act to the statements made to the legislative branch. Prior to that decision, the applicability of 18 U.S.C. § 1001 to statements made to the legislative branch had been established in *United States* v. *Bramblett,* 348 U.S. 503 (1955), *United States* v. *Diggs,* 613 F.2d 988 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 982 (1980); and *United States* v. *Hansen,* 772 F.2d 940 (1985). The Supreme Court itself presented its decision to overrule Bramblett as a technical reading of the statute's precise language, not as an effort to achieve some necessary policy purpose. In fact, the Court defended its action by noting that because of the "judicial function" exception that had developed in the courts of appeals since Bramblett, what it was doing "will, as a practical matter, preserve the interpretation of § 1001 that has prevailed for over 30 years. * * *" 115 S. Ct. at 1765. Preserving the interpretation of § 1001 as it applies to the judicial branch is the concern of other witnesses. (I would note, however, as was correctly observed to me by certain staff, that the current drafting of the "adjudicative function" exception would be improved by having it apply whatever branch that "adjudicative function" occurs in; there is no reason to have an adjudicative function exception that applies in federal adjudicative proceedings but not to federal quasi-judicial administrative hearings or to legislative branch quasi-judicial proceedings such as impeachment and ethics proceedings).

This statute's particular applicability to statements submitted to legislative branch investigations has been shown in *United States* v. *Lavelle*, 751 F.2d 1266, 1270 n.3 (1985). The need for submission of truthful information to the legislative branch traces back to what the Supreme "Court has often noted[,] that the power to investigate is inherent in the power to make laws because [a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 504 (1975). As the Supreme Court said, quoting Woodrow Wilson:

"Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct."

Hutchinson v. *Proxmire,* 443 U.S. 111, 132 (1979) (quoting Woodrow Wilson, Congressional Government 303 (1885)).

Given that the need of Congress to receive truthful information can hardly be disputed, the noncontroversiality of the bill follows from its narrow purpose simply to restore the penalty for false statements to Congress. No one is sitting down now at the committee table to codify or to detail just where the false statements act does, or does not, apply. Just as doctrines developed regarding executive- and judicial-branch situations where 18 U.S.C. § 1001 might not apply, such as the "exculpatory no" and "judicial function" doctrines (see, e.g., Giles A. Birch, *False Statements to Federal Agents: Induced Lies and the Exculpatory No,* 57 U. Chi. L. Rev. 1273 (1990)), so there have been arguments regarding legislative-branch situations where 18 U.S.C. § 1001 might not apply. After all, it can always be argued by those opposing the applicability of 18 U.S.C. § 1001 to some particular situation that Congress can, in that situation, administer oaths if it has a need to assure criminal penalties. The particular situations in which this argument has been made have ranged from the argument that the false statements statute did not apply to Ethics in Government Act financial disclosure statements because that statute expressly provided for a different enforcement scheme (an argument vigorously presented by Congressional amici, but rejected by one Circuit, in *United States* v. *Hansen,* 772 F.2d 940 (1985)), to the argument that the false statement act did not apply to certain kinds of testimony in politically charged matters. (This latter argument was made by Professor Peter W. Morgan, Associate Professor of Law at the University of Tennessee, in *The Undefined Crime of Lying to Congress: Ethics Reform and the Rule of Law,* 86 Nw. U. L. Rev. 177–258 (1992).)

Part of why this is a noncontroversial bill is that it does not attempt to settle these arguments. It simply restores the pre-Hubbard rule, that is, the Bramblett rule, that 18 U.S.C. § 1001 has applicability to the legislative branch (and the judicial branch) in general as well as to the executive branch, leaving to the evolving case law to resolve which if any particular situations are not covered.

For example, speaking from my experience as a Senate and House counsel intimately involved with the past 17 years of litigation in Congressional internal ethics and administration, I expect the courts to take with the utmost seriousness the arguments that certain particular internal ethics and administration situations are not appropriate for 18 U.S.C. § 1001 applicability. For example, with the spate of statutes such as the Congressional Accountability Act, and the increasing ethics disclosure statutes and rules, there has been an explosion of requirements of mandatory filing by Members of documentation on all aspects of their official, campaign, and personal capacities. Somewhere the line is being, and will continue to be, drawn between situations of this kind worthy, if false statements are made, of federal criminal liability, and situations of this kind solely deserving treatment by the internal processes for ethics and administrative procedures.

As Deputy House Counsel, I vigorously argued on behalf of the House Bipartisan Leadership, in the civil case brought by the Department of Justice against Representative Charlie Rose, that the internal House ethics proceeding for him should have been the end of the matter, without further civil liability. *United States* v. *Rose,* 28 F.3d 181 (D.C. Cir. 1994). Although I could not persuade the D.C. Circuit in that case, some of the arguments presented in that case were recently accepted, in a different form, by a different panel of the D.C. Circuit in *United States* v. *Rostenkowski,* 59 F.3d 1291 (D.C. Cir. 1995). This bill simply leaves where they were the open issues of where the lines are between the false statement cases to be resolved by the criminal process, and the ones that should not go beyond the internal Congressional ethics and administrative processes. Rather, the bill lets that line be drawn as particular cases occur. Perhaps in an ideal world Congress could foresee

those issues and resolve them now, but that could only be at the price of slowing down this bill by involving it in controversy, which no one thinks advisable because, by leaving Hubbard in effect, it would prevent § 1001 from applying even to the legislative branch situations of its undisputed appropriateness.

All I would want is to record here my understanding that the bill is not intended to resolve these questions on which it is silent. Because this bill in its current form discusses expressly one particular exception, what used to be the judicial function doctrine, there is always a danger that prosecutors will invoke the canon expression unius est inclusio alterius to mean that some kind of decision is being made by the Congress now to freeze the statute to the exclusion of any other exceptions, doctrines, or unresolved arguments about why the statute would not apply to particular legislative ethics or housekeeping situations. No one who understands Congress' intent in a noncontroversial bill to restore the law to what it was, would apply that canon and maintain that such issues are now being resolved.

An additional safeguard for fairness to congressional witnesses

In keeping with the effort to express a balanced viewpoint on this bill, I note the desirability of preserving and extending the safeguards for fairness to Congressional witnesses. Of course, no one wants witnesses, even unsworn ones, to lie to Congress. Yet, at the same time, Congressional inquiries have certain aspects less common in inquiries by the executive and judicial branches, so that 18 U.S.C. § 1001 could create situations of potential unfairness to Congressional witnesses. Congress is the cockpit for political debate on public policy, including controversial and partisan matters, in a way that is not found in the proceedings of either of the other branches of government. Witnesses who testify in House and Senate hearings take a place in that political debate, of a kind not experienced anywhere else to the same degree in the government system. The vulnerability of such witnesses to unconsidered or vindictive oppression is part of what previous safeguards, from statutory provisions and Congressional codes of rules for witnesses, to judicial doctrines constraining prosecutions for contempt of Congress, have aimed to prevent. See John C. Grabow, Congressional Investigations: Law and Practice (Prentice Hall 1988). Thus, when applying § 1001 to Congressional testimony, one must be mindful of that vulnerability.

For 18 U.S.C. § 1001, the danger is how easily Congressional testimony can be followed by initiation of criminal investigation, even when the initiation of investigation occurs on an unconsidered and narrowly vindictive basis. I am not saying that this has been a constant or even a frequent problem. Individual § 1001 investigations have been controversial, but there has not been a pattern of abusive initiation of investigations. So, I am not suggesting, and do not believe, that the potential for this is a reason to slow down the passage of this valuable bill.

At the same time, let me note the kind of safeguard that exists informally in the pattern of referrals for criminal proceedings regarding false statements, and formally in the existing legislation regarding referrals for criminal proceedings regarding other legislative matters. Before there can be a prosecution for contempt of Congress pursuant to 18 U.S.C. § 192, a chamber of Congress, either the House or Senate as applicable, must adopt a resolution certifying the contempt for prosecution. In other words, a witness has the safeguard against triggering of investigations on an unconsidered, unaccountable, and possibly even narrowly vindictive basis, that a majority of a chamber of Congress must vote in favor of an investigation of a witness for contempt before it can occur.

Similarly, before the machinery of the Independent Counsel statute can be formally invoked, a majority of Members of the (House or Senate) Judiciary Committee on either the majority or minority side must support the request for the Independent Counsel. See 28 U.S.C. § 595(e).

In a different vein, the Congressional immunity statute, 18 U.S.C. § 6005, has a related type of safeguard. Before a Congressional investigation can confer testimonial immunity upon a witness, there must be a vote, by two-thirds of a full committee, to do so. This prevents granting of immunity on an unconsidered or unaccountable basis.

Why would such a safeguard be needed for 18 U.S.C. § 1001? Let us take the type of situations of concern. A Congressional witness before some Senate or House Subcommittee can easily be, or become, a figure of political controversy, viewed by potential complainants as a target for their own narrow factional purposes. Even if virtually all the subcommittee's members consider any complaint a matter of some complainant's ill-founded political or partisan vindictiveness, quite undeserving of investigation, let alone prosecution, and even likely to impair the subcommittee by embroiling it in unsought controversy, what can they do? A complaint can be lodged under 18 U.S.C. § 1001 against the most distinguished Executive Branch officials in

the land, or against witnesses who are respected spokespersons voluntarily testifying for important causes. Frankly, it could happen to me, to any of my fellow witnesses today, or even to Senators and Representatives for all their statutorily required filings.

Let me pose some law professor-style hypotheticals that I hope no one expects to occur. What if—

The current House Standards Committee investigation of Speaker Newt Gingrich is completed without need for prosecutorial follow-up as far as the views of the committee, and indeed of 99% of the House, but some single disgruntled minority Member asks the Justice Department for an 18 U.S.C. § 1001 investigation of the Speaker's personal submissions. Does he become a criminal investigative target? How can he raise the fact that the committee wanted nothing of the sort?

Some current Senate investigation is completed without need for prosecutorial follow-up as far as the views of the committees, and indeed of 99 Senators, but some single disgruntled Member signs a letter to the Justice Department asking an 18 U.S.C. § 1001 investigation of an otherwise unblemished witness's submissions. Does she become a criminal investigative target? Can she raise the fact that the committee wanted nothing of the sort?

The House Committee on House Oversight finishes work assisting all Representatives' classifying of all personal office staff for FLSA purposes as "professional" or "clerical," but some single disgruntled individual, or some public group, asks the Justice Department for an 18 U.S.C. § 1001 investigation of the documentation submitted by some particular Representative? Does she become a criminal investigative target? Can she raise the fact that the administration committee wanted nothing of the sort?

Of course, you can trust to the good sense of the Justice Department to quickly sift the worthy complaints from the unworthy. But we do not do that for criminal contempt of Congress, or for formal Independent Counsel requests, both of which have a statutory threshold requirement of a Congressional vote to launch.

Moreover, I believe that informally, as part of the element of the false statements offense of materiality, there has been in the past something of a sifting process for Congressional complaints regarding § 1001. For example, when the House Judiciary Committee made its referral that led to the Independent Counsel investigation underlying *Morrison* v. *Olson,* it did so by formal vote of the Committee to make a report. (H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985).) The report embodied the deliberations of the Judiciary Committee, after a two-year investigation by two distinguished staff counsels, Jonathan Cuneo and James Schweitzer. That thorough sifting and Committee voting threshold undoubtedly led to the narrow focus of the referral, just to three officials out of a cast of scores who had been scrutinized before the referral was made, and most particularly, as for § 1001, to the single central target.

Based on this pattern, I believe it is already possible for a witness to bring to Justice Department investigators, and to the court in the event of charges, as part of the element of materiality, the fact that the committee of jurisdiction itself never considered the matter worthy of referral, and, given the chance to decide in a deliberative fashion, would have voted not to refer it. What I would propose is to make this more formal. It should be recognized as a complete defense by a Congressional witness, which she could present to Justice Department authorities making decisions in the matter, or, in the event of formal charging, which she could present in court, that the investigation or prosecution had been initiated without any considered or accountable Congressional committee decision as to the materiality of the alleged false statements. Just as that would be a central point in an investigation and prosecution for contempt of a Congressional committee, indeed, given that there must be certification by the House or Senate, an absolute threshold requirement, it should be a central point in an investigation and prosecution for false statements to a Congressional committee.

This committee could go further and formally codify a requirement of Congressional consideration as a threshold requirement before investigation of 18 U.S.C. § 1001 offenses by Congressional witnesses. Here is draft language that would express this: "*Materiality.*"

"No investigation or proceeding pursuant to this provision against a person for making statements to the legislative branch may commence prior to a majority vote by the House or Senate committee of jurisdiction to refer the matter as involving a material false statement."

A formal referral could be made, as false statement referrals have in the past, by adoption by a committee or subcommittee of a report on the matter, or perhaps by a considered resolution subscribed by committee members. For matters of internal ethics and administration, or for statements made to investigative arms of Con-

gress such as the General Accounting Office, the committee of jurisdiction would be the committee with legislative or oversight responsibility, such as the committees on ethics, administration, and governmental affairs. As with committees today that often formally vote on whether to refer charges of perjury, no conclusions about guilt or innocence would be implied by the vote on referral, and no prosecution could use such votes as evidence of guilt. They are just an added and appropriate safeguard, further cementing the noncontroversiality of restoring 18 U.S.C. 1001's applicability.

The bill's other provisions: Obstruction, subpoena enforcement, and immunity

Tribute should be paid to those Senators, particularly Senator Levin, who have tirelessly pursued over the years the other reforms in this bill. Two of these provisions, regarding civil enforcement and immunity, were previously (in 1988) passed by the Senate, reported out of the House Judiciary Committee, and voted favorably by a majority of the House (which did not suffice for enactment only because the House vote occurred under suspension of the rules, so passage would have required a two-thirds vote); these provisions, as well as the third for which the need emerged after 1988, have long awaited their merited enactment into law. I will address each briefly.

Obstruction: The obstruction provision returns the law regarding obstruction of Congress pursuant to 18 U.S.C. § 1505 to where it was before the decision in *United States* v. *Poindexter,* 951 F.2d 369 (D.C. Cir. 1991). There is no sound policy reason why it should be criminal to obstruct other investigations by certain methods, but legal to obstruct Congressional ones by those methods. This provision simply reunifies the interpretation of the various obstruction statutes.

Subpoena enforcement: The subpoena enforcement provision refines the Senate civil enforcement statute, 18 U.S.C. § 1365, a statute which is intended to resolve good-faith legal disputes over objections to evidentiary demands by Senate committees. I have a long familiarity with this statute, as I briefed and argued the first case under it, *Senate Permanent Subcommittee on Investigations* v. *Cammisano,* three times in the district court, and twice in the D.C. Circuit, for Senators Nunn and Roth. The civil enforcement statute has always excluded Executive officials acting within their official capacity, and would continue to do so. That exclusion's intent has been to keep Executive Branch privileges or objections from being resolved by this process.

(The reasons not to resolve Executive Branch privileges civilly have been the subject of a constitutionally sophisticated debate, worthy of note even though this bill does not involve it. See the article by the former General Counsel to the House, Stanley Brand, Constitutional Confrontations: Preserving a Prompt and Orderly means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials, 36 Cath. U.L. Rev. 71 (1986)); also see Todd D. Peterson, Prosecuting Executive Branch Officials for Contempt of Congress, 66 N.Y.U.L. Rev. 563 (1991). In any event, for those disputes, we have other methods. See Peter M. Shane, Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information, 44 Admin. L. Rev. 197 (1992), and sources cited therein.)

Without being distracted by this, the civil enforcement statute's current wording unfortunately creates an ambiguity over the availability of resort to this civil enforcement process even when an Executive official is refusing to provide evidence without any Executive Branch privilege or objection. In other words, when any witness outside the Executive Branch has a good-faith personal, constitutional, or statutory objection—ranging from some unsettled point of Fifth Amendment law to common law privileges—the Senate can resolve the objection using this statute, but it cannot do so for Executive Branch officials. (For a fine treatment of witness' legal objections, see Morton Rosenberg, Investigative Oversight: An Introduction to the Law, Practice and Procedure of Congressional Inquiry, Congressional Research Service, 95–164 A April 7, 1995). This amendment will rightly implement the intent of the Executive Branch official exclusion by having that exclusion only cover officials who have been directed by their superiors not to comply based on an Executive Branch privilege or objection.

Immunity: The bill would clarify that when a Congressional investigation obtains a court-issued immunity order pursuant to 18 U.S.C. § 6005, the order applies, both providing protection for the witness and preventing his withholding evidence, not only in proceedings "before" the committee, but in "ancillary" proceedings. This is already the law for "ancillary" judicial proceedings. There is some ambiguity about whether it is true for "ancillary" Congressional proceedings, but this is the result of historical accident, not any policy reason. The bill would eliminate that ambiguity and bring the process up to date.

In 1970, when this provision was enacted, Congressional investigations did not make the kind of use of depositions, the quintessential "ancillary" proceeding, that

judicial cases did. Actually, it was the Senate Judiciary Committee itself, with its Billy Carter investigation in 1980, which developed the deposition to its modern use. You would find in one of your own committee prints, Inquiry Into the Matter of Billy Carter and Libya: Hearings Before the Subcommittee to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the Senate Committee on the Judiciary, 96th Cong., 2d Sess., Volume III (Appendix) (1980), the first example of the modern version of Congressional committee rules for such depositions, which I drafted, and the first full legal analyses of such depositions.

Since then, the extensive use of these depositions is discussed in the fine work by Jay R. Shampansky, Staff Depositions in Congressional Investigations, CRS Report No. 91–679, August 27, 1991. There is every reason, if not more so, to depose immunized witnesses as there is for others, either as sound preparation prior to public hearings, or because it is inconvenient or even impossible to obtain their presence for public hearings, as with Iran-Contra witnesses who (for understandable legal reasons) would not enter the United States to give evidence but who were agreeable to immunized questioning overseas. See George W. Van Cleve & Charles Tiefer, Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations; Lessons of the Iran-Contra Affairs, 55 Mo. L. Rev. 43 (1990).

Conclusion

For the reasons discussed, the bill is a noncontroversial, yet important, measure for restoring Congress' authority to obtain truthful information.

Senator SPECTER. Thank you very much, Professor Tiefer. I have just glanced at your book, the table contents, and lifted it and weighed it, in effect, and it is a very, very impressive document, with an extraordinary compendium of footnotes and research. Does Senator Byrd know about your book?

Mr. TIEFER. I cited him many times, Mr. Chairman.

Senator SPECTER. All the times that Senator Byrd has been cited he doesn't necessarily know about. I am going to ask him about your book and he may purchase a copy.

Mr. TIEFER. I have his book on my shelf. He is——

Senator SPECTER. Which of his books do you have on your shelf? He has many books.

Mr. TIEFER. His multi-volume work on the history of the——

Senator SPECTER. How many volumes is it?

Mr. TIEFER. I am concerned about the requirements for truthful testimony. I only have two of the volumes.

Senator SPECTER. I think there are only two.

Well, thank you very much, gentlemen, for coming in. I think this is a very important bill and it is so fundamental that we really need to get on about it and get it passed because we do need to be able to rely on statements which are made to the Congress beyond any question whatsoever. It is a little hard to understand how the Supreme Court can change a decision which has been standing for 40 years, makes perfectly good sense, and the Congress has not touched.

I am advised that if we conclude relatively briefly, we may establish a new record for a Judiciary Committee hearing on overturning a Supreme Court decision. We thank you for coming.

I have been asked by my learned counsel to hold the record open so that if others on the committee wish to submit questions to you, we will do that. Thank you.

[Whereupon, at 10:40 a.m., the committee was adjourned.]

APPENDIX

PROPOSED LEGISLATION II

104TH CONGRESS
2D SESSION

S. 1734

To prohibit false statements to Congress, to clarify congressional authority to obtain truthful testimony, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 8, 1996

Mr. SPECTER (for himself, Mr. LEVIN, Mr. STEVENS, Mr. NUNN, Mr. COHEN, Mr. INOUYE, Mr. JEFFORDS, Mr. LEAHY, and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To prohibit false statements to Congress, to clarify congressional authority to obtain truthful testimony, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "False Statements Penalty Restoration Act".

SEC. 2. RESTORING FALSE STATEMENTS PROHIBITION.

Section 1001 of title 18, United States Code, is amended to read as follows:

1 **"§ 1001. Statements or entries generally**

2 "(a) PROHIBITED CONDUCT.—

3 "(1) IN GENERAL.—A person shall be punished
4 under subsection (b) if, in any matter within the ju-
5 risdiction of the executive, legislative, or judicial
6 branch of the United States Government, or any de-
7 partment, agency, committee, subcommittee, or of-
8 fice thereof, that person knowingly and willfully—

9 "(A) falsifies, conceals, or covers up, by
10 any trick, scheme, or device, a material fact;

11 "(B) makes any materially false, fictitious,
12 or fraudulent statement or representation; or

13 "(C) makes or uses any false writing or
14 document, knowing that the document contains
15 any materially false, fictitious, or fraudulent
16 statement or entry.

17 "(2) APPLICABILITY.—This section shall not
18 apply to statements, representations, writings, or
19 documents submitted to a court in connection with
20 the performance of an adjudicative function.

21 "(b) PENALTIES.—A person who violates this section
22 shall be fined under this title, imprisoned for not more
23 than 5 years, or both.".

1 **SEC. 3. CLARIFYING PROHIBITION ON OBSTRUCTING**
2 **CONGRESS.**

3 Section 1515 of title 18, United States Code, is
4 amended—

5 (1) by redesignating subsection (b) as sub-
6 section (c); and

7 (2) by inserting after subsection (a) the follow-
8 ing new subsection:

9 "(b) As used in section 1505, the term 'corruptly'
10 means acting with an improper purpose, personally or by
11 influencing another, including, but not limited to, making
12 a false or misleading statement, or withholding, conceal-
13 ing, altering, or destroying a document or other informa-
14 tion.".

15 **SEC. 4. ENFORCING SENATE SUBPOENA.**

16 Section 1365(a) of title 28, United States Code, is
17 amended in the second sentence, by striking "Federal
18 Government acting within his official capacity" and insert-
19 ing "Executive Branch of the Federal Government acting
20 within his or her official capacity, if the head of the de-
21 partment or agency employing the officer or employee has
22 directed the officer or employee not to comply with the
23 subpoena or order and identified the Executive Branch
24 privilege or objection underlying such direction".

1 **SEC. 5. COMPELLING TRUTHFUL TESTIMONY FROM IMMU-**
2 **NIZED WITNESS.**

3 Section 6005 of title 18, United States Code, is
4 amended—

5 (1) in subsection (a), by inserting "or ancillary
6 to" after "any proceeding before"; and

7 (2) in subsection (b)—

8 (A) in paragraphs (1) and (2), by inserting
9 "or ancillary to" after "a proceeding before"
10 each place it appears; and

11 (B) in paragraph (3), by inserting a period
12 at the end.

○

RESPONSES BY ROBERT S. LITT TO QUESTIONS FROM SENATOR HATCH

Question 1. Did the line of lower court cases establishing the so-called judicial function exception survive *Hubbard*? [Citations omitted.] The Court noted in *Hubbard* that "the text of § 1001 forecloses any argument that we should simply ratify the body of cases adopting the judicial function exception. * * * Although the judicial function exception has not been adopted by this Court, our review of Barmblett supports the conclusion that the cases endorsing the exception almost certainly reflect the intent of Congress. It is thus fair to characterize the * * * exception as a 'competing legal doctrine,' that can lay a legitimate claim to respect as a settled body of law. Overruling Bramblett would preserve the essence of this doctrine and would, to that extent, promote stability in the law." (115 S.Ct. 1754, 1763–1764.) If the exception did survive, what implications does this have for its codification?

Answer 1. The case law establishing the judicial function exception did not survive the Supreme Court's opinion in *Hubbard*. The Supreme Court held that the courts are not a department or agency of the United States, and thus false statements submitted to the courts are not covered by 18 U.S.C. § 1001. Given that broad holding, there is no place for a judicial function exception under the current law.

The portions of Justice Stevens' opinion regarding the judicial function exception that are cited in your question are not part of the Court's opinion, and were joined by only two other justices. In the portion of Justice Stevens' opinion that was joined by the majority of the Court, Justice Stevens noted the following:

"[A] straightforward interpretation of the text of § 1001, with special emphasis on the words 'department or agency,' would seem to lead inexorably to the conclusion that there is no need for any judicial function exception because the reach of the statute simply does not extend to courts." *Hubbard* v. *United States*, 115 S.Ct. 1754, 1758 (1995).

Justices Scalia and Kennedy concurred with Justice Stevens' result, but refused to join in much of his discussion of the judicial function exception. Their concurrence points out that the judicial function exception has "no basis in the text of the statute." *Hubbard,* 115 S.Ct. at 1766 (Scalia, J. concurring).

All of the discussion of the judicial function exception in *Hubbard* was based upon the language of section 1001 as currently written, and would have little or no impact on the meaning of a newly-drafted provision that includes a judicial function exception.

Question 2. If Congress were to include in the recrafted statute an explicit judicial function exception, or a legislative function exception, what impact would this have on claims of similar exemptions for statements to the executive branch when it acts in an adjudicatory or legislative capacity, as under the Administrative Procedure Act, for example?

Answer 2. The enactment of an explicit judicial or legislative function exception without the enactment of any similar exception for the executive branch would make clear to the courts that no such exception applies for false statements submitted to the executive branch, regardless of the capacity or manner in which the executive branch was acting. We believe that all false statements submitted to the executive branch should be prosecutable under 18 U.S.C. § 1001.

Question 3. Do you believe there is a need for Congress to address other doctrines, such as the so-called "exculpatory no" doctrine as it redrafts section 1001?

Answer 3. Although the Department of Justice does not agree with the "exculpatory no" doctrine that has been developed by some courts, we do not favor including a provision regarding the "exculpatory no" in the current amendment of section 1001 for two reasons.

First, we do not see the "exculpatory no" defense as a significant barrier to law enforcement at this time. The United States Attorney's Manual acknowledges the "exculpatory no" doctrine, but instructs Federal prosecutors to construe this defense narrowly, so that we can continue to prosecute individuals for "affirmative, discursive and voluntary" statements that are false. *See* U.S.A.M. § 9–42–160 (Bluesheet February 12, 1996). We are increasingly successful in persuading the courts to confine the doctrine narrowly or to eliminate it altogether. *See, e.g., United States* v. *Rodriquez-Rios,* 14 F.3d 1040 (5th Cir. 1994) (*en banc*); *United States* v. *LeMaster,* 54 F.3d 1224 (6th Cir. 1995).

Second, the "exculpatory no" doctrine is frequently tied by the courts to the Fifth Amendment privilege against self-incrimination. We disagree that the "exculpatory no" defense is required by the Fifth Amendment, but we are concerned that an at-

tempt to address the "exculpatory no" in the present amendment will delay the needed revision of Section 1001 because of the sensitivity of those perceived Fifth Amendment concerns.

RESPONSES BY ROBERT S. LITT TO QUESTIONS FROM SENATOR SPECTER

Question 1. What is the position of the Department of Justice on a "legislative function" exception to 18 U.S.C. § 1001 to parallel the "judicial function" exception?

Answer 1. As Congress contemplates including a legislative function exception in section 1001, Congress should consider the following:

First, Congress engages in a wide variety of activity in carrying out its duties, including investigations, fact-finding, constituent services, and legislative activity. It would be difficult to define and separate those areas of Congress' activity that would be subject to the protection of section 1001 from those that would not. That task would be particularly difficult in the context of a criminal statute, which must provide clear notice of which activity is prohibited.

Second, the primary function of Congress is quite different from that of the Federal courts, where the adversarial process of resolving conflicts between specific parties helps to provide safeguards for the integrity of information that is submitted, and at the same time creates a special need for an exception so as not to chill legitimate advocacy.

Finally, section 1001 applied to false statements submitted to the legislature for at least 40 years prior to *Hubbard,* and we do not see evidence that it chilled the submission of information to Congress or otherwise adversely affected the legislative process.

Question 2. Does the Department of Justice believe that the bill needs to codify the "judicial function" exception?

Answer 2. The highest priority of the Department of Justice in this area is to achieve an amendment of section 1001 following the Supreme Court's decision in *Hubbard* so that unsworn false statements made to any of the three branches of the Federal government may once again be prosecuted. At the same time, the Department of Justice agrees with the principle of protecting vigorous advocacy in the Federal courts, and we understand that there are very strong concerns that underlay the courts' creation of the judicial function exception. Accordingly, we believe that the enactment of a properly limited judicial function exception will help achieve the central goal of restoring the application of section 1001 to all three branches of the Federal government.

RESPONSES BY ROBERT S. LITT TO QUESTIONS FROM SENATOR LEAHY

Question 1. Even without amending section 1001 to cover the Congress, other statutes, such as perjury, false claims and obstruction of justice statutes (18 U.S.C. § 1621, 1623, 1505), penalize some of the same conduct. While there is an overlap, what conduct would be covered by the proposed amendment in S. 1734 to section 1001 that is not covered by the other statutes?

Answer 1. The amended false statement statute will provide the Department of Justice with a greater ability to prosecute the submission of false and fraudulent statements and documents to Congress, and thereby provide greater protection for the integrity of information submitted to Congress. The other criminal provisions that are listed in your question have a variety of additional requirements that do not apply under section 1001.

For example, the perjury statute requires that the witness be placed under oath before a competent tribunal, and the obstruction of justice provisions generally require that a formal proceeding be pending. These provisions would not cover the submission of an unsworn statement or any fraudulent document to a Senator or committee outside the context of a formal hearing or investigation, or even formal hearings in which witnesses are not sworn. The false statement statute would reach this conduct.

Similarly, the false claims statute, 18 U.S.C. § 287, is limited to the submission of false or fraudulent claims upon the government. False statements and documents that are submitted to Congress but that are not part of such a claim are not covered by section 287. This includes, for example, information and documents that are submitted to the Senate by other government officials in which those officials do not make a claim for government funds.

An amended, section 1001 is equally necessary to reach unsworn false statements or documents submitted to the judiciary, such as false letters to probation officers. We believe that all of this conduct should be punished.

Question 2. Would the proposed amendments in S. 1734 ensure that material information relayed either orally or in writing to staff on behalf of the Senate is subject to the false statement prohibitions of section 1001?

Answer 2. If the amendment contained in S. 1734 were enacted, the Department of Justice could prosecute a person for submitting an oral or written false statement of fact to a Senate staff member. As with any false statement prosecution, however, we must be able to show that the false statement was made knowingly and willfully, and that it was material to a matter within the jurisdiction of the department or agency to which the statement was submitted.

Question 3. Unlike subpoenas against natural persons or state officials, under 28 U.S.C. § 1365(a), Senate subpoenas against federal agencies are not enforceable in court. Nevertheless, on occasion, such as the Ruby Ridge hearings concluded last year, the Department of Justice insists on receiving a subpoena before producing documents. Under what circumstance does the Justice Department require service of a subpoena before producing documents to a Senate Committee or Subcommittee?

Answer 3. As we advised in response to follow-up questions in connection with the Ruby Ridge hearings, the Department believes that properly authorized Senate subpoena have legal effect, regardless of whether they are judicially enforceable. Our experience has been, however, that congressional information needs and executive branch confidentiality interests can almost always be satisfied during the course of the informal accommodation process that has been developed in the interaction between the two branches in the course of congressional oversight. It is a relatively rare circumstance when the accommodation process fails to resolve a dispute and a subpoena is issued.

Question 4. Should the gap in current law relating to the judicial enforceability of Senate subpoenas be eliminated? If not, could you explain why?

Answer 4. The Department is opposed to legislation authorizing the Senate or its committees to seek judicial enforcement of subpoenas against the executive branch. We believe that public policy is better served when the branches resolve such disputes through a process of accommodation rather than protracted litigation over separation of powers issues. The existence of judicial enforcement authority would tend to undercut the accommodation process referred to in the response to question 3 and alter the balance in the relationship between the legislative and executive branches.

Question 5. S. 1734 would require that a refusal to comply with a Senate subpoena by an officer or employee of the Federal government acting in his or her official capacity be directed by the head of the agency based upon clearly articulated governmental privileges. Would this amendment modify current practice and, if so, could you explain how?

Answer 5. Under longstanding executive branch procedures, executive privilege may not be asserted against Congress without the specific authorization of the President. Thus, the amendment would not change current practice with respect to assertion of executive privilege. However, non-compliance with a congressional subpoena may also rest on a basis other than executive privilege. For example, compliance may be prohibited by law in certain circumstances, such as where disclosure of information is prohibited by the grand jury secrecy requirement of Rule 6(e) of the Federal Rules of Criminal Procedure. More fundamentally, we are concerned that an amendment like that proposed by S. 1734 would make more formal the interaction in this area between the legislative and executive branches, and inappropriately involve the judicial branch, to the detriment of the accommodation process that has served the political branches so well.

I hope this information is helpful to you and the Committee. Please do not hesitate to contact me if I may be of further assistance concerning this or any other matter.

RESPONSE BY THOMAS B. GRIFFITH TO QUESTION FROM SENATOR SPECTER

Question. Professor Tiefer outlined a proposal to require a committee vote prior to the initiation of any investigation for making any false statements to Congress. Do you believe this proposal is a good idea?

Answer. Professor Tiefer's proposal would add a significant procedural hurdle to a prosecution under 18 U.S.C. § 1001. His proposal would shift the location for the decision to initiate an investigation that might lead to a prosecution away from the Department of Justice to a congressional committee. Such a shift might be warranted if it was the judgment of Congress that the Justice Department had in the past improperly initiated prosecutions under section 1001, or if there was a sense that there is a reasonable threat of such improper prosecutions in the future.

Shifting to congressional committees the burden of the decision to initiate an investigation that might lead to a prosecution under section 1001 would require members to vote on a sensitive matter—whether to commence a criminal investigation—in what may likely be a highly charged partisan atmosphere. Many of the recent prosecutions of congressional witnesses under section 1001 were related to investigations of the activities of the executive branch in connection with Iran/Contra. Moreover, a number of the prosecutions brought under section 1001 before Hubbard involved members who were accused of making false statements on financial disclosure forms or in connection with the financial affairs of their offices. Professor Tiefer's proposal would call upon committee members to determine whether the Justice Department should initiate an investigation of a fellow member that might lead to prosecution under section 1001.

Finally, I note that there is no present requirement under the perjury statute, 18 U.S.C. § 1621, for congressional approval of perjury investigations. For both perjury and false statement cases, the existing requirement of materiality provides some opportunity for congressional input to assure that the prosecution is consistent with the needs of the legislative process.

RESPONSES BY THOMAS B. GRIFFITH TO QUESTIONS FROM SENATOR LEAHY

Question 1. Even without amending section 1001 to cover the Congress, other statutes, such as the perjury, false claims and obstruction of justice statutes (18 U.S.C. §§ 1621, 1623, 1505), penalize some of the same conduct. While there is an overlap, what conduct would be covered by the proposed amendment in S. 1734 to section 1001 that is not covered by the other statutes?

Answer 1. The perjury statute, 18 U.S.C. § 1621, applies only to false statements made under oath. The false claims statute, 18 U.S.C. § 287, applies only to false claims for money from the U.S. Treasury. In *United States* v. *Poindexter,* 951 F.2d 369 (D.C. Cir. 1991), the United States Court of Appeals for the D.C. Circuit held that the obstruction of justice statute, 18 U.S.C. § 1505, applies only to persons who attempt to obstruct a congressional inquiry indirectly through another person, and not to witnesses themselves. Thus, none of these statutes makes criminal two types of unsworn false statements made to Congress that were criminal under 18 U.S.C. § 1001 before *Hubbard* v. *United States,* 115 S.Ct. 1754 (1995), and which would be criminal once again if S. 1734 is enacted: (1) false statements made knowingly to congressional investigators; and (2) false statements made knowingly in a financial disclosure report. Before the Supreme Court's decision in *Hubbard,* federal prosecutors gained convictions under section 1001 against those who knowingly provided Congress with false, unsworn information in the following ways: testimony to a committee; oral statements made to committee members; oral statements made to committee staff; written submissions accompanying testimony to a committee; written statements in a letter responding to committee inquiries; and false information in the financial disclosure report required of all members under the Ethics in Government Act. In the wake of *Hubbard* and in the absence of amendments to 18 U.S.C. §§ 1001 and 1515 as in S. 1734, none of these false statements would be a criminal violation under the perjury, false claims, or obstruction of justice statutes.

Question 2. Would the proposed amendments in S. 1734 ensure that material information relayed either orally or in writing to staff on behalf of the Senate is subject to the false statement prohibitions of section 1001?

Answer 2. The proposed amendment to section 1001 described in section 2 of S. 1734 would subject oral and written information provided to congressional staff to section 1001 penalties if the information is material to matters within the jurisdiction of the inquiring committee and if the person providing the information knows it to be false. Congressional staff act as agents of the members, committees and subcommittees that employ them.

Question 3. Unlike subpoenas against natural persons or State officials under 28 U.S.C. § 1365(a), Senate subpoenas against federal agencies are not enforceable in court. Nevertheless, on occasion, such as the Ruby Ridge hearings concluded last year, the Department of Justice insists on receiving a subpoena before producing documents. Under what circumstances does the Justice Department require service of a subpoena before producing documents to a Senate Committee or Subcommittee?

Answer 3. It is my understanding that this question is directed primarily to the Justice Department, which is better situated to provide a complete answer. It is my observation, however, that in most instances the executive branch will produce documents to a Senate committee in response to a written request. It is the unusual occasion in which the executive branch requires a congressional subpoena as a condition of providing information.

Question 4. Should the gap in current law relating to the judicial enforceability of Senate subpoenas be eliminated? If not, could you explain why?

Answer 4. Whether to extend the jurisdiction of 28 U.S.C. § 1365 is a policy determination to be made by Congress. An awareness of the history of section 1365 may help inform that judgment. Section 1365 of Title 28 authorizes the Senate to seek civil enforcement of its subpoenas in federal court to secure testimony or the production of documents. An exception to this grant of judicial jurisdiction exists for subpoenas issued to any "officer or employee of the Federal Government acting within his official capacity." 28 U.S.C. § 1365(a). Early drafts of the legislation did not contain such an exception; in fact, section 1365 was originally developed largely in response to the district court's dismissal, for lack of jurisdiction, of the Ervin Committee's request for a declaratory judgment regarding the lawfulness of its subpoena of President Nixon's tape recordings. See *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 366 F. Supp. 51 (D.D.C. 1973).

While section 1365 was under consideration in Congress, the executive branch strongly opposed conferring jurisdiction upon the federal courts to decide conflicts between the executive and the legislative branch. In testimony before a subcommittee of the Senate Committee on Government Operations, then-Assistant Attorney General Antonin Scalia argued that weighing the legislature's need for information against the executive's need for confidentiality was "the very type of 'political question' from which * * * the courts [should] abstain." Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Government Operations, 94th Cong., 1st Sess. 117 (1975).

In response to this objection, Congress created an exclusion for officers and employees of the Federal Government acting within their official capacity. In so doing, we believe that Congress intended only to avoid granting jurisdiction to courts to decide questions that would require a tribunal to weigh a claim of executive privilege against a legislative need for information. In creating this exception, Congress did not intend to protect all federal employees against civil enforcement of all Senate subpoenas. Nonetheless, in the years since section 1365 was enacted, an executive branch employee has argued that the exception to section 1365 jurisdiction for federal employees permitted him to interpose the purely personal, as opposed to governmental, privilege against self-incrimination to block jurisdiction under section 1365. Furthermore, there was concern that a legislative branch employee faced with a subpoena from a Senate committee might invoke the exclusion in section 1365 to resist the production of information vital to a committee investigation on the ground that he was "an officer or employee of the Federal Government acting within his official capacity."

Although we believe that these arguments are inconsistent with the intent of section 1365, the proposed legislation would assist Congress in avoiding similar controversies in the future by expressly limiting the exception to section 1365 jurisdiction to those cases in which executive privilege is at issue. The proposed legislation would clarify the exclusion in three ways: (1) by limiting the exclusion to officers and employees of the executive branch alone, rather than the entire federal government; (2) by requiring the head of the employing department or agency to direct the officer or employee not to comply with the subpoena or order, which is consistent with and in fact considerably less restrictive than the executive's own policy (see answer to No. 5); and (3) by requiring the employing department or agency to identify the executive branch privilege or objection underlying the refusal to comply. It is our view that the proposed legislation would not alter the intended meaning of the statute, but would clarify the circumstances in which the exception to jurisdiction can rightfully be invoked, thereby ensuring that only officially approved claims of executive privilege are used to resist section 1365 jurisdiction.

Question 5. S. 1734 would require that a refusal to comply with a Senate subpoena by an officer or employee of the Federal government acting in his or her official capacity be directed by the head of the agency based upon clearly articulated governmental privileges. Would this amendment modify current practice and, if so, could you explain how?

Answer 5. It is my understanding that this question is directed primarily to the Department of Justice, which is better situated to provide a complete answer. Because the Senate has had some recent experience with executive branch claims of privilege, I offer the following observations. The procedures for invoking executive privilege are set forth in a November 4, 1982 White House memorandum from the President for the "Heads of Executive Departments and Agencies" on "Procedures Governing Responses to Congressional Requests for Information." In a May 9, 1996 letter to the Chairman of the House Committee on Government Reform and Oversight, Counsel to the President Jack Quinn noted that these procedures had been adopted by President Clinton. According to the 1982 White House memorandum, an

officer or employee may invoke executive privilege against the Congress only after the President has approved that decision. In practice, official claims of executive privilege have been rare. More commonly, disputes between the executive branch and the legislative branch regarding the scope of a request for information have been settled through mutual accommodation. When there is a claim of executive privilege, because the President will have already had to approve the privilege claim, it should impose no additional burden on the executive branch to require the head of the department or agency affected to identify the basis for the privilege assertion.

Responses by Charles Tiefer to Questions From Committee Members

To address the questions submitted regarding my testimony before the Senate Judiciary Committee at its May 14, 1996, hearing on "False Statements after *Hubbard*," it is more useful for me to submit this memorandum than to provide separate answers. In large measure, the questions implicate the evolving nature of Senate investigative authority, in two aspects: the need to amend 1001, and the need to make adjustments in the Senate civil enforcement provisions.

AMENDING 1001

Senator Specter asks: In his testimony, the Senate Legal Counsel stated that perjury is not a good fit for the way the Senate does business. In light of your experience, do you agree that reliance on the perjury statute is insufficient to protect the interests of both Houses of Congress in ensuring truthful evidence?

When Senator Specter asks about Congress' interest in ensuring truthful evidence, he goes to the heart of the context in which the perjury statute is insufficient. Most Congressional evidence-gathering occurs through hearings; in only a small fraction of hearings are oaths administered, and almost none of the documents that go into hearing records have their truthfulness sworn to. Thus, rarely is the perjury statute available to deal with false evidence, and rarely do witnesses have to decide whether to be truthful with the perjury statute being applicable.

My experience in both the Senate and House is that the chairs of committees and subcommittees are reluctant to administer oaths, not because they wish to condone untruthfulness, but because they have learned that many witnesses express embarrassment at being required to take an oath. Unless the chair has a policy, which almost none do, of swearing in every witness, then the request to particular witnesses to take oaths will be felt as the chair's adverse comment on those particular witnesses. Moreover, at hearings covered by photographers, the embarrassment of witnesses at taking the oath is compounded by their expectation that news photographs of them taking the oath will visually convey a symbolic message of adverse comment. Yet, my experience in both the Senate and House is also that the solemnity of a Congressional hearing gives witnesses the same notice about their testimony as the administration of an oath by a notary public to someone being deposed or giving an affidavit. Hence, as far as obtaining truthful evidence at hearings, the perjury statute often does not suffice, and 1001 should apply.

This answer also addresses Senator Leahy's question about what S. 1734 would cover that other statutes do not. Perjury does not apply absent an oath. The false claims statute rarely applies to Congressional testimony, since most witnesses are seeking some general policy change, not a specific payment. Whether the obstruction of Congress statute, 18 U.S.C. sec. 1505, covers false statements is a separate question as a technical matter, but in my experience, as a practical matter, before indicting for obstruction, prosecutors want to see other types of conduct in addition to an individual's false testimony given by itself—other types such as document destruction, wrongful efforts to influence other witnesses, or group collaboration to put across what is collectively known to be a false version.

As to whether 1001 covers false material information relayed to staff, I think it depends on the particular circumstances, such as how closely what the staff is doing relates to an authorized committee investigative action like a hearing. At one end of the spectrum, 1001 would definitely cover conveying a false certification to staff about to place it in a hearing record. *United States* v. *Lavelle,* 751 F.2d 1266, 1270 n.3 (D.C. Cir. 1985). At the other end of the spectrum, Senate staff who receive and respond to a Senator's general constituent correspondence are, for tort immunity purposes, engaged in an activity authorized by the Senate, but the Senate has not, by rule, delegated to staff or even to Senators, in responding to such correspondence, many of the investigative powers, such as subpoenas and oaths, reserved for authorized committee investigative activity. One could imagine many constituent correspondence situations ill-suited to 1001.

The in-between case is that of false material statements relayed to committee staff engaged in oversight but not explicitly authorized to conduct depositions. Here, I am suggesting that the most relevant factor is the degree to which the staff are engaged in a hearing-like, or hearing-related, authorized committee investigative action. For example, the law regarding staff depositions, and what it takes to authorize and to conduct them, is complex and getting more, not less so. I would refer you to the citations on staff depositions in my testimony, and in addition, to the comparatively recent discussion by the House Rules Committee in *Providing Special Authorities to the Committee on Government Reform and Oversight to Obtain Testimony on the White House Travel Office Matter,* H.R. Report No. 472, 104th Cong., 2d Sess. (March 6, 1996).

SENATE CIVIL ENFORCEMENT PROVISIONS

Senator Leahy's other three questions concern the Senate subpoena civil enforcement statute. I would largely defer to the special expertise of the Senate Legal Counsel, Thomas Griffith, and his office about the statute that they so ably apply. However, since you ask me to respond, I will add my brief, largely echoing, observations about the evolving Senate investigative authority in this regard.

When does the Justice Department require subpoenas before producing documents? I have previously given lengthy testimony about the history of oversight confrontations between Congress and the Department, but without discovering the secret to answering that intriguing question in general; it is hard enough to provide particular answers in particular situations. (My testimony is the *The Attorney General's Refusal to Provide Congressional Access to "Privileged" Inslaw Documents: Hearing Before the Subcomm. On Economic and Commercial Law of the House Comm. On the Judiciary,* 104th Cong., 2d Sess. 83–104 (1990).) If you are kind enough to invite me back on your next confrontation with the Department, I will be glad to try my hand at an answer in that particular situation.

As to whether the gap in current law relating to the judicial (civil) enforceability of Senate subpoenas should be eliminated, Mr. Griffith can provide the sophisticated explanation of how that gap came into existence and its parameters. The bottom line is that the gap is in the adjudication Executive privilege claims. The argument against such resort has been that some Executive privilege disputes are essentially political rather than legal in nature, and ought to be resolved through political rather than adjudicative channels. The classic treatment of the subject is Stanley M. Brand & Sean Connelly, *Constitutional Confrontations: Preserving a Prompt and Orderly Means by Which Congress May Enforce Investigative Demands Against Executive Branch Officials,* 36 CATH. U. L. Rev. 71 (1986). For discussion by one of the leading scholars of separation of powers, with citations to other influential articles of the past decade, see Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing,* 48 Admin. L. Rev. 109 (1996).

Finally, as to current practice (and its relations of S. 1734) on Executive privilege claims, I could add nothing to the Senate Legal Counsel's sound analysis, other than that his statement of the current practice evinced in the recent Quinn contempt may be read in conjunction with my published treatment of the same situation. C. Tiefer, *Contempt of Congress: Turf Battle Ahead,* Legal Times, May 27, 1996, at 26.

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